No. _____

In The

Supreme Court of the United States

October Term, 1989

SHELL OIL COMPANY,

Petitioner,

vs.

RAYMOND J. LEONARDINI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

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QUESTIONS PRESENTED

Petitioner Shell sued respondent Leonardini and another in the U.S. District Court for trade libel (product disparagement). Shortly Shell settled with the other, and dismissed as to Leonardini. For Shell's filing this complaint, a state-court jury awarded Leonardini $197,000 general and $5,000,000 punitive damages for malicious prosecution. On these facts,

1. Does California violate the Fourteenth Amendment's Due Process Clause or impair the First Amendment right to petition the government when it allows a jury to award punitive damages more than 25 times greater than the general damages found in a malicious prosecution case, without providing the jury adequate standards for determination of such damages?

2. Does the Due Process Clause or the First Amendment right to petition the government require that the burden of proof for punitive damages be by "clear and convincing" evidence and that such damages not be excessive?

PARTIES

In addition to the parties named in the caption, the parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of petitioner Shell Oil Company are listed below:

The "Shell" Transport and Trading Company, P.L.C. (co-parent of Shell Petroleum)

Royal Dutch Petroleum Company (co-parent of Shell Petroleum)

Shell Petroleum, N.V. (parent of SPNV)

SPNV Holdings, Inc. (parent of Shell Oil Company)

Quazite Corporation

First Harlem Securities Corporation

Fractionation Research, Inc.

Gravcap, Inc.

Heat Transfer Research, Inc.

Inland Corporation

Loop, Inc.

Mesbic Financial Corporation of Houston

Oil Companies Institute for Marine Pollution Compensation Limited

Oil Insurance

Limited Pioneer Equipment Co.

Seadock, Inc.

PARTIES – Continued

Pecten Cameroon Company

Thums Long Beach Company

East Texas Salt Water Disposal Company

Grande Ecallie Land Company, Inc.

Van Salt Water Disposal Company

Wyoming Industrial Development Corporation

Cortez Capital Corporation

Plastibeton, Inc.

Butte Pipe Line Company

Dixie Pipeline Company

Explorer Pipeline Company

Locap, Inc.

Olympic Pipe Line Company

Plantation Pipe Line Company

West Shore Pipe Line Company

Wolverine Pipe Line Company

Lone Star Polymer Concrete Corporation

General Hydrocarbon Polymer Concrete Inc.

Polycon Research, Inc.

Morrison Molded Fiber Glass Company

Premis/E.M.S., Inc.

Kyntex, Inc.

Glastrusions, Inc.

PARTIES – Continued

Glass-Steel, Inc.

Huntsman Chemical Company

Lucky Chance Mining Company, Inc.

George Neuman and Company

United Scientific, Inc.

A. T. Massey Coal Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

Shell Oil Company ("Shell") petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Third Appellate District.

OPINIONS BELOW

The opinion of the court of appeal (App. A) is partially reported. All but Parts IV and V are published at 216 Cal.App.3d 547, 264 Cal.Rptr. 883. The order of the court of appeal denying rehearing (App. B) is not reported. The order of the California Supreme Court

denying Shell's petition for review (App. C) is not reported.

JURISDICTION

The trial court judgment was entered on April 22, 1986 and affirmed by the court of appeal on December 12, 1989. The court of appeal denied Shell's petition for rehearing on January 5, 1990. App. B. Shell filed a petition for review with the California Supreme Court on January 22, 1990. The California Supreme Court denied the petition for review on March 29, 1990 by a vote of 4 to 3 (Lucas, C.J., Panelli, J., and Eagleson, J., voting to grant the petition). App. C. On April 17, 1990, the Superior Court of California, County of Sacramento, stayed all proceedings for enforcement or execution of the judgment pending final action by this Court on any petition for writ of certiorari filed by Shell. App. D.

This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are reprinted in the Appendix as items E, F, and G.

STATEMENT

A. Preliminary

This case presents a due process challenge to the traditional method used by states to impose punitive

damages. In this respect, the case greatly resembles *Pacific Mutual Ins. Co. v. Haslip*, No. 89-1279.[1]

This case differs from *Haslip* in its importance. Punitive damages were not here imposed to deter shoddy manufacturing, curtail sharp sales practices, or root out insurance company misbehavior. Here Shell was punished for filing a lawsuit in federal court, thereby to secure redress on account of a provocative campaign of product disparagement. The $5 million penalty assessment for malicious prosecution is meted out not only to punish Shell, but to deter it and others from filing such suits again. As the filing of a lawsuit is the exercise of the First Amendment right of petition, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), this case calls more urgently than *Haslip* for standards and restrictions on jury-imposed punitive damages. Discerning criteria for punishment are needed lest First Amendment rights are devalued by the threat of sanctions. Thus, the factors which counsel for punitive damage guidelines and restrictions in a case like *Haslip* are especially relevant in a case such as this.

To these subjects we turn, after first stating the case.

B. Of Plumbers, Pipes, Chemists, and Lawyers

Shell manufactures the chemical resin polybutylene, which is used in making plastic pipes. App. at 5a.

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[1] Also pending is the petition for certiorari in *International Society for Krishna Consciousness v. George*, No. 89-1399. That case presents a challenge to the imposition of punitive damages upon a religious organization under California law.

Polybutylene pipe has been in use since 1970 and, by 1979, had been approved for use in transporting drinking water in thirty-seven states.

In 1979, the California Department of Housing began considering whether it would approve plastic pipe for unrestricted use in California. App. at 5a. Plumbers in California, who have an economic interest in such matters, opposed approval of plastic pipes. RT 1434.[2] Plastic pipe is cheaper than its traditional metal counterparts to install, maintain, and repair.

Respondent Raymond J. Leonardini is a lawyer. App. at 4a. In 1979, a plumber's trade and lobbying group, the California Pipe Trades Council ("CPTC"), retained Leonardini as its spokesman and advocate before the Department of Housing in connection with the pending issue of plastic pipe use. App. at 4a.

Plastic pipe can be made from many substances, three of which are polybutylene, PVC, and CPVC. Testing had shown that chemicals infiltrated water transported in pipe made of PVC and CPVC. As a result, the Department of Housing directed that an Environmental Impact Report ("E.I.R.") be submitted before PVC or CPVC pipe would be evaluated for approval. This contamination study dealt with PVC and CPVC, not polybutylene. App. at 5a, 7a.

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[2] Citations to "RT" are to the Reporter's Transcript of the trial. Citations to "CT" are to the Clerk's Transcript of papers filed with the trial court. Citations to "App." are to the Appendix bound following the signature page.

Acting for his plumber clients, Leonardini sought to lump polybutylene with PVC and CPVC. No scientific test showed that polybutylene pipe posed any health risks. Accordingly, Leonardini hired California Analytical Laboratories ("CAL") to test polybutylene pipe and identify its chemical characteristics. Using samples furnished by Leonardini's clients, CAL produced a report dated December 31, 1980. CAL reported that a number of unexpected chemicals, including the carcinogen DEHP, were in polybutylene. Leonardini furnished this report to Department of Housing officials. App. at 7a-8a.

Shell became aware of the report. As the manufacturer of polybutylene resin, Shell knew that the reported presence of DEHP was inexplicable. Shell had laboratory analyses showing only trace amounts of DEHP in water transported through polybutylene. App. at 8a-9a.

In April 1981 Leonardini compiled a booklet described as the "Health Hazards Associated With Plastic Pipe, A Status Report". His report portrayed the CAL findings as "alarming," branded Shell's analyses as seriously flawed, and suggested that Shell officials had misled the public about the safety of polybutylene. App. at 10a-11a. Leonardini's booklet made no reference to five additional CAL studies, each of which he had commissioned, and each of which found no DEHP in polybutylene pipe or its accessories. App. at 9a-10a.

On April 20, 1981, the California Department of Housing held a hearing and called for an E.I.R. on polybutylene pipe systems. App. at 11a.

Meanwhile, during this transition period, while further regulatory action awaited completion of the E.I.R.,

Leonardini distributed his "Status Report" outside the Housing Department hearing process to anyone who asked for it (App. at 11a; RT 1237), as part of what the court of appeal termed the "widespread" dissemination of the Report and its cancer alarm. App. at 11a, 14a.

In the spring and summer of 1981, Shell was deluged with consumer inquiries. Polybutylene pipe extruders reported substantial adverse effects on their businesses. App. at 12a, 14a. Polybutylene customers, including the United States Navy, conducted independent tests on polybutylene (finding no DEHP). Nevertheless, some customers temporarily discontinued use of the pipe systems to supply water, pending test results. App. at 13a.

C. Shell's Resort to Federal Court

In August 1981, Shell filed a complaint in the United States District Court for the Eastern District of California, invoking the court's diversity jurisdiction.[3] The complaint sought to enjoin trade libel and to obtain declaratory relief against CAL and Leonardini.

California recognizes a cause of action for trade libel, the contours of which are set out in the Second Restatement of Torts. The tort is defined as:

> the publication of matter disparaging the quality of another's land, chattels, or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other's interests in the property. App. at 32a.

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[3] The complaint is reprinted as Appendix H, App. at 78a.

Statements can be trade libel if they "are intended to cause the business financial harm and in fact do so." App. at 32a.

In its federal complaint, Shell alleged that it manufactured polybutylene resin; that CAL's test reported that polybutylene contained DEHP in levels sufficient to cause cancer in laboratory animals; that CAL's test was erroneous, yet Leonardini willfully, intentionally, without justification or privilege, and in reckless disregard of the truth, published and communicated the CAL report and its DEHP findings; that CAL and Leonardini had disparaged Shell's product, thereby deterring prospective customers from buying polybutylene pipe and resin, with damaging consequences to Shell which could not be measured with precision. Shell prayed for an injunction to restrain CAL and Leonardini from further publishing and communicating the presence of DEHP in polybutylene pipe. Shell also sought a declaratory judgment that polybutylene resin and pipe do not contain harmful amounts of DEHP. App. at 15a-16a; 78a, *et seq.*

D. Shell's Voluntary Termination of the Federal Action

Shell settled that part of the federal action brought against the laboratory, CAL. As a result, CAL publicly acknowledged that the DEHP finding was episodic, that additional testing was necessary, and that CAL had no opinion whether polybutylene contains DEHP. App. at 16a-17a.

Leonardini and Shell each moved to dismiss the suit against Leonardini. Leonardini contended that Shell could never secure an injunction or declaratory relief

given free speech and other constraints. App. at 17a. Therefore, Leonardini also sought sanctions. At that time, federal sanction standards under F.R.Civ.P. Rule 11 were still evolving. Consequently, Leonardini made application under California's Code of Civil Procedure § 128.5. In 1982, that section permitted monetary sanctions on a showing that an action or tactic in court was undertaken in "bad faith." App. at 17a-18a; CT 33, 57. As understood in 1982, "bad faith" under § 128.5 included "frivolousness," defined as including knowledge that the law "preclude[s] the action or any recovery . . . " *Atchison, T. & S.F.R. Co. v. Stockton Port Dist.*, 140 Cal.App.3d 111, 116, 189 Cal.Rptr. 208 (1983).

The federal court ruled that Shell had a right to dismiss pursuant to F.R.Civ.P. Rule 41. Leonardini's motion for sanctions was denied by the federal judge: on the pleading record, sanctions could not "adequately be resolved by way of a motion at this stage of this litigation." CT 304. In denying sanctions, the district court observed:

> But it seems to me overall it is equally true that promiscuous awarding of these attorney fees would also act as a serious deterrent for people who have serious litigation problems coming into court and seeking to test these people, particularly where it may be that the law is fixed but maybe somebody thinks that's not where the law ought to be. Trs. of 4/26/82, 18:1-7.[4]

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[4] This federal court hearing transcript was made part of the record in this case by judicial notice taken at the request of respondent's lawyer. RT 3-4.

E. The Malicious Prosecution Action

On April 15, 1983, Leonardini filed this action, alleging that Shell's filing of the federal court complaint amounted to malicious prosecution and abuse of process.[5] The case went to jury trial in the Sacramento County Superior Court.

Under California law, the plaintiff in a malicious prosecution action must prove that the prior action (1) was commenced by or at the defendant's direction and terminated in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. *Bertero v. National General Corp.*, 13 Cal.3d 43, 50, 529 P.2d 608, 118 Cal.Rptr. 184 (1974). Malice is only relevant if there is no probable cause. In other words, a suit prosecuted by a plaintiff with malice may not be the subject of a later action for malicious prosecution if the plaintiff had probable cause. *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 875, 765 P.2d 498, 254 Cal.Rptr. 336 (1989).

At the close of the evidence, the trial judge directed a verdict against Shell on the issue of probable cause. The court determined as a matter of law that Shell was not entitled to obtain injunctive or declaratory relief in its federal action for trade libel and that no reasonable lawyer would have solicited such relief. App. at 19a-20a. Following this directed verdict on probable cause, the trial court instructed on the issue of "malice," defining that term as:

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[5] Respondent's lawyer dismissed the cause of action for abuse of process at the start of the trial.

> a state of mind which actuates the doing of an act for some improper or wrongful motive . . . or a wish to vex, annoy, or injure another . . . App. at 20a.

Further,

> [t]his Court having found that [Shell] lacked probable cause for initiating the Federal proceeding against plaintiff . . . , you may infer that Shell . . . acted with malice. App. at 20a.

Finally, the jury was instructed that it could in the exercise of discretion award punitive damages if it found by a preponderance of the evidence that Shell acted with "oppression, fraud, or malice." App. at 64a.

The jury's verdict was for Leonardini, awarding him $22,000 in attorney's fees incurred in defense of Shell's federal action, $175,000 as damages for emotional distress, and $5,000,000 in punitive damages. The trial court denied Shell's post-judgment motions. App. at 18a.

On Shell's appeal, the court of appeal affirmed. App. at 1a, *et seq.* The court drew a sharp distinction between the *legal* and the *factual* aspects of Shell's federal suit for trade libel. Examining the factual record, the court found that Shell had a sound factual basis for the accusation that Leonardini's attempt to link polybutylene with cancer was false: "[W]e think Shell had reason to believe [Leonardini's] claims were not true." App. at 34a. The court also credited Shell's evidence that Leonardini's cancer accusation had been widely disseminated and produced fear among consumers. App. at 11a, 14a.

With respect to the law, the court employed the California standard of probable cause in a malicious prosecution action, namely "whether any reasonable attorney

would have thought the claim tenable." *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 886, 765 P.2d 498, 254 Cal.Rptr. 336 (1989); App. at 25a. This standard was applied by the court to Shell's federal complaint, "upon which the probable cause determination must be based." App. at 31a. Using this approach, the court ruled that Shell's prayer for injunctive relief was untenable because Leonardini's activities related to a matter of public interest which the federal court was powerless to enjoin under the prior restraint doctrine of the First Amendment. App. at 35a-45a. The court ruled that Shell's prayer for declaratory relief bore on scientific facts under consideration by the State of California as part of its study of plastic pipe systems. Therefore, it said, the federal court was powerless to provide Shell with a declaration that Leonardini's accusation about Shell's product was false. App. at 45a-46a.

Over the dissent of three justices, the California Supreme Court declined to review the case. App. D.

REASONS FOR GRANTING THE WRIT

A. The Due Process Challenge to Punitive Damages Presents a Recurring Issue Already Found Worthy of the Exercise of Certiorari Jurisdiction

The imposition of punitive damages in civil cases presents several federal constitutional issues. The Court has disposed of the challenge under the Excessive Fines Clause. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989). Due Process

challenges are now before the Court. *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279.

This case presents the due process concerns about punitive damages presented in *Haslip*, and does so on facts which even more urgently call for review in this Court. These concerns, particularly as to the lack of standards given juries to guide them in the imposition of punitive damages, "raise important issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986).

In this case, the due process challenge arises under the regime of punitive damage law long employed in the nation's most populous state. Under California law applicable in this case, broad discretion is given to the jury. That breadth was characterized in *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 388, 202 Cal.Rptr. 204 (1984):

> The process through which a fact finder finds punitive damages is somewhat contradictory. * * * The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. * * * The process is further complicated by the lack of objective criteria from either the legislature or the courts as to "how much" is necessary to punish and deter.

The jury instructions given on punitive damages in this case concretely illustrate the aimlessness and imprecision which prompted the *Devlin* characterization:[6]

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[6] These instructions were drawn from a standardized form of jury instructions used in California civil practice. *Compare*

(Continued on following page)

> You may, in your discretion, award [punitive] damages if, but only if, you find by a preponderance of the evidence that said defendant was guilty of oppression or malice. . . .
>
> * * *
>
> The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jurors' sound discretion, exercised without passion or prejudice.
>
> In arriving at any amount of punitive damages, you are to consider the following:
>
> > One, the reprehensibility of the conduct of the defendant.
> >
> > Two, the amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.
> >
> > Three, the punitive damages must bear a reasonable relation to the actual damages. RT 2656-57.

Standards of this character bring to mind observations made or joined by five members of the Court. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989), the separate opinions of Justices Brennan and O'Connor noted serious vagueness and due process problems attending instructions quite similar to those given in the present case. *Id.* at 2922 (Brennan, J., with Marshall, J., concurring); *id.* at

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Cal. Jury Instns., Civil, Book of Approved Jury Instructions (7th ed. 1986), No. 14.71. The relevant statute, from which the instruction was drawn, is California Civil Code § 3294, which is reprinted in relevant part as Appendix G, App. at 77a.

2924 (O'Connor, J. with Stevens, J., dissenting). Justice O'Connor, joined by Justice Scalia, made the same point in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 1655-56 (1988) (concurring opinion).[7]

In addition to the due process implications presented when vague and virtually standardless instructions beget discretionary awards of punitive damages, decisions of this Court also suggest that the Due Process Clause " 'forbids damages awards that are grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.' *St. Louis, I.M.&S.R. Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Missouri Railway Co. v. Humes*, 115 U.S. 512, 522-23 (1885)." *Browning-Ferris, supra*, 109 S.Ct. at 2923 (Opinion of Brennan, J.).

A third constitutional issue bearing upon the imposition of punitive damages is the proper standard of proof. "Increasing the burden of proof is one way to impress the fact finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [determinations] will be [made]." *Addington v. Texas*, 441 U.S. 418, 427 (1979).[8] In particular, higher standards of

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[7] In *Browning-Ferris*, Vermont law informed the jury: "You may take account of the character of the defendants, their financial standing, and the nature of their acts." 109 S.Ct. at 2923.

[8] Many states, including California, have recently reformed their punitive damages law to provide for a higher standard of proof. By amendment to California Civil Code § 3294, the law now provides:

(Continued on following page)

proof are often employed when the judicial process must resolve issues of wrongdoing, even if they arise in civil cases or proceedings. *Id.*, at 424. As the Second Circuit recently observed, in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir. 1990):

> We acknowledge the force of the argument that since punitive damages are awarded primarily to punish a defendant for past conduct and to deter it and others from similar conduct in the future, a standard of proof appropriate for "quasi-criminal wrongdoing" should be required.

Shell's case presents to the Court each of these aspects of constitutional law relevant to the imposition of punitive damages under the Due Process Clause. By a preponderance of the evidence, the jury was asked to apply discretion without meaningful guidance from the statute or the bench. The penalty amount – $5 million – is grossly disproportionate to Shell's "offense." F.R.Civ.P. Rule 11 now authorizes sanctions for frivolous suits to "give effect to the rule's central goal of deterrence." *See*

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> (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

This statute applies to cases "in which the initial trial was not commenced prior to January 1, 1988." Cal. Civil Code § 3294(c). It is not applicable to this case.

Cooter & Gell v. Hartmarx Corp., ___ S.Ct. ___, 58 U.S.L.W. 4763, 4765 (June 11, 1990). The rule quantifies the appropriate sanction: "an order to pay expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." F.R.Civ.P. Rule 11.

The California jury here awarded respondent as general damages attorney's fees and costs incurred in defense of the federal complaint ($22,000.00), as well as $175,000.00 as compensatory damages for emotional distress. Permitting an additional $5 million in punitive damages is an extreme and excessive sanction, completely out of line with the amount of punishment (costs and fees) specified by Rule 11. Furthermore, the punitive damages have as their sole purpose "deterrence," an interest already vindicated by the award of fees, costs, and emotional distress damages.

Shell properly presented its constitutional objections in the California courts. The California Supreme Court has upheld the constitutionality of punitive damages awarded under the standards used in this case, as against the claim that statutory standards are "unconstitutionally vague because [they] fail[] to provide sufficient guidance for the trial courts. . . . " *Bertero v. National General Corp.*, 13 Cal.3d 43, 66 n.13, 529 P.2d 608, 118 Cal.Rptr. 184 (1974). Consequently, under California decisions, the only court in that state able to consider such a claim is the California Supreme Court. That court termed as "pointless" presentation of a claim to a trial or intermediate appellate court which is at odds with existing California Supreme Court precedent. *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal.3d 287, 292 n.1, 758 P.2d 58, 250 Cal.Rptr.

116 (1988). As one California Court of Appeal recently explained, *Farajpour v. University of Southern California*, No. BO37903 (Cal. Ct. App., 2d Dist., June 7, 1990) (1990 Cal. App. LEXIS 602):

> . . . while *Browning-Ferris* may portend a United States Supreme Court reexamination of the constitutionality of punitive damages, USC's contention cannot properly be addressed to any court subordinate to the California Supreme Court. (See *Orange County Water District v. City of Riverside* (1959) 173 Cal. App.2d 137, 165-166.) . . . 'Our duty as an intermediate appellate court is to follow the decisional law laid down by the state Supreme Court. We violate jurisdictional bounds when we do otherwise. *(Auto Equity Sales, Inc. v. Superior Court* [1962] 57 Cal.2d 450 [20 Cal.Rptr. 321, 369 P.2d 937].)' *(Beckman v. Mayhew* (1975) 49 Cal.App.3d 529, 536.)

In keeping with the California requirement, Shell presented its present due process challenge as a "question presented" in its petition for review in the California Supreme Court. The three Justices who voted to grant Shell's petition were willing to consider that issue and all others presented by Shell.[9]

In addition to presentation to the California Supreme Court, Shell also presented its constitutional challenge to punitive damages to each of the lower California courts considering this case. Following the jury's verdict, Shell

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[9] Appendix C, App. at 72a. As is the case in certiorari practice, the California Supreme Court may grant a petition for review to consider some or all of the issues presented. When less than all issues are taken, the Court so specifies. *See* Rule 29.2(b), Cal. Rules of Court.

moved for a new trial in the Superior Court on several grounds, one of which referred to the due process deficiencies inherent in punitive damage awards. CT 775. Shell drew specific attention to this Court's opinion in *Lavoie*, where the due process issue presented in *Haslip* is specifically identified. Shell renewed the objections before the California Court of Appeal.

This case merits certiorari for the same reasons the Court accepted the *Haslip* case. One course open on this petition would be for the Court to hold this case and later return it to the California courts for further study once there is a decision in *Haslip*.

B. Petitioner's Due Process Claims Are Even More Worthy of This Court's Review Than Those Presented in Other Recent Cases Because of Imposition of Punitive Damages for Exercise of First Amendment Rights

In addition to *Haslip* and issues concerning the imposition of punitive damages in civil litigation generally, the award of punitive damages bestows upon respondent a windfall at Shell's expense for conduct amounting to Shell's exercise of its First Amendment right to petition the government by filing suit in a federal court. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (right to commence legal proceedings is a fundamental one protected by the First Amendment).

The contemporary debate about constitutional restrictions on punitive damages in civil litigation has been fueled by several of the Court's decisions restricting the award of such damages in cases where the state

interest in punishment and deterrence must be weighed against constitutionally protected aspects of the defendant's conduct. This Court has specifically addressed this dichotomy in circumstances where punitive damages are extracted to punish or deter conduct which enjoys some measure of First Amendment protection. The leading case is *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, the Court prohibited punitive damage awards in defamation actions unless plaintiff musters clear and convincing evidence of actual malice. The higher standard of proof was used precisely to protect countervailing First Amendment values. *Id.* at 350; *see also Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 83 (1971) (Marshall, J., dissenting).

The essence of the analysis of the California Court of Appeal is that Leonardini's attack on Shell was part of a public debate of a public issue. App. at 37a, 38a (discussing the "crux" of the case). In this connection, the court of appeal found credible and well-taken Shell's factual contention that Leonardini wrongfully linked Shell's product with cancer and disseminated the charge widely. App. at 34a. These well-taken factual allegations furnished the elements of Shell's cause of action for trade libel, particularly the element requiring proof of intentional or reckless falsehood aimed by Leonardini at Shell's pecuniary relationships. App. at 32a-33a (collecting the authorities). The idea that trade libel cannot be enjoined, even when it is by the definition of that tort false speech deliberately engineered to inflict business ruin, is at odds with this Court's constitutional jurisprudence. Deliberate falsehood is of no First Amendment value, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,

771-72 (1976), and false commercial speech may be regulated, even enjoined. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973).

Nevertheless, in respect of injunctive relief, the court of appeal viewed the truthfulness or bona fides of Leonardini's statements, as well as the alleged motivation of business injury, as beside the point, because the grant of injunctive relief would be a prior restraint, muffling full and robust debate about an issue of public concern. App. at 44a-45a.

If this is a fair characterization of the situation, *it is of the whole situation.*[10] Shell's suit touches upon the same subject matter cordoned off by the court of appeal as of "public concern." Leonardini laid falsehoods before a public body. On that basis the court of appeal ruled that injunctive remedies were no longer available to remedy the disparagement because speech about issues of public concern cannot be enjoined. Yet Shell's trade libel complaint concerns the same subject matter, and it too was submitted to a governmental body. The First Amendment

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[10] Whether speech genuinely relates to a matter of public concern "is determined by content, form, and context . . . as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 47-48 (1983). Because Shell dismissed its trade libel action voluntarily, and because the state court directed a verdict on the issue of probable cause in the malicious prosecution action, the contextual facts necessary to decide whether Leonardini's commercially ruinous speech was of "public concern" were never fully developed in this case. App. at 28a. Mere linkage of polybutylene to an issue of public health does not suffice to transform speech from commercial to political. *E.g., Bolger v. Young Drug Products*, 463 U.S. 60 (1983).

values protected under the Speech Clause are on no higher plane than the values embodied in the right to petition by filing a suit. The same considerations which provoked the Court in *Gertz* to be solicitous of Speech Clause values when states administer their punitive damage laws now call upon the Court to strike a similar accommodation between punitive damage liability and the First Amendment right to sue in a federal court. In *Gertz*, equipoise was achieved by requiring that plaintiff prove actual malice by clear and convincing evidence in order to recover punitive damages in an action for defamation. *See also Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749-81 & n.4 (1985) (Brennan, J., with Marshall, Blackmun, and Stevens, JJ., dissenting).

No similar accommodation of competing interests was struck in this case. Indeed, all Shell's liability, including punitive damages, can be traced back to the instruction to infer malice from the directed verdict on probable cause. That directed verdict was based on the untenability of Shell's prayer. App. at 30a-32a. Thus all of Shell's liability derives from the prayer in its federal complaint and the state court view that injunctive or declaratory relief would not have been tenable if Shell had actively litigated its case, rather than voluntarily dismissing it. California interests in punishing and deterring an erroneous prayer are given great sway, even though California acknowledges that the factual allegations of the complaint are soundly based. Little more than lip service is paid to "the policy which favors open access to the courts for the resolution of conflicts," App. at 30a, and the First Amendment foundation for that policy.

App. at 21a, *citing, Trucking Unlimited,* 404 U.S. at 510-11.[11]

Such a result is constitutionally unacceptable. The question is not whether there can be punitive damages, but whether there must be adequate assurances that the threat of such damages not deter the presentation of potentially meritorious claims for adjudication. In addition to the prayer for an injunction, which had arguable validity, *see ante,* p. 19-20, Shell prayed for a declaratory judgment that would have entailed no restraint against Leonardini or the California Department of Housing. Indeed, the state was not a party to Shell's trade libel action and would not be foreclosed by litigation of such an action. *See, e.g., Steffel v. Thompson,* 415 U.S. 452, 482 (1974) (Rehnquist, J., concurring).

The court of appeal took the view that Shell's declaratory judgment was calculated to achieve an adjudication that polybutylene was safe, thereby to usurp the function of the administrative proceedings before the California Department of Housing. App. at 45a-46a.

Declaratory judgment actions mount an impermissible "end run" around state administrative proceedings when "used to pre-empt and prejudge issues that are

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[11] Shell presented to the California courts in the malicious prosecution action its submission that the prayer for injunctive and declaratory relief was legally tenable and ought not be punished out of respect for the constitutional and public interest in free access to the courts. *See* Pet'n. for Review, Jan. 22, 1990, pp. 27-28 (Cal. Supr.); Ct. App. R. Br., March 25, 1988, pp. 1-2, 4 (Ct. App.).

committed for initial decision to an administrative body . . . " *Public Service Comm'n v. Wycoff*, 344 U.S. 237, 246 (1952). Shell's suit sought relief from a campaign of trade libel. Scientific facts about polybutylene would be at issue in any action for trade libel, in the sense that the truthfulness of Leonardini's assertions about polybutylene would be part of Shell's case-in-chief.[12] So long, as here, the declaratory judgment sought by a plaintiff is not directed at the administrative process, a reasonable litigant could conscientiously apply for declaratory relief adjudicating as between private parties a controversy concerning scientific facts.

Finally, whatever view be taken of the prayer in Shell's complaint, this is notice pleading. The court of appeal regarded the factual allegations of the complaint as fairly and reasonably alleged. App. at 34a. Rigid analysis of the prayer is inappropriate in a case of voluntary dismissal without active litigation following a settlement. *See Conley v. Gibson*, 355 U.S. 41 (1957).[13] The California court's unyielding view of the sufficiency of a prayer in a federal court complaint harkens back to a view followed

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[12] The same facts would have to be resolved in an action for trade libel seeking damages. The whole tenor of the court of appeal's analysis assumes a different outcome if Shell's action had been one for damages. App. at 35a (whether or not Shell's action would have supported a prayer for damages is beside the point because malicious prosecution liability is based upon the relief prayed for).

[13] *Id.* at 418: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . "

by the courts at Westminster but left behind by the modern Federal Rules.

The end result of this process is to penalize Shell $5 million for the single act of seeking relief from a federal court. The question in this case is whether jury discretion to select and impose penalties, and thereby deter the filing of lawsuits, must be channeled by standards of substantive law and proof which protect the right of access to the courts.

CONCLUSION

The writ of certiorari should be granted.

DATED: June 26, 1990

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THE THIRD APPELLATE DISTRICT

(Sacramento)

RAYMOND J. LEONARDINI, Plaintiff and Respondent, v. SHELL OIL COMPANY, Defendant and Appellant.	3 Civil C000619 (Super. Ct. No. 310945) FILED DEC 12 1989

APPEAL from a judgment of the Superior Court of Sacramento County. Lloyd A. Phillips, Jr., Judge. Judgment affirmed.

Sedgwick, Detert, Moran & Arnold, Stephen W. Jones, for Defendant and Appellant.

Friedman, Collard & Poswall, John M. Poswall, for Plaintiff and Respondent.

In this malicious prosecution action we are called upon to resolve the clash between the claimed right to

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* Pursuant to rule 976.1 of the California Rules of Court, the Reporter of Decisions is directed to publish all portions of this opinion except parts IV and V.

enjoin a trade libel and the constitutional right of free speech. The case had its genesis in an earlier but unsuccessful attempt to obtain an injunction against the publication of a report concerning the safety of plastic pipes for domestic water use. The published report was first filed in the record of the governmental agency conducting hearings on the question and was then later disseminated elsewhere. We resolve the conflict in favor of free speech.

The central question is whether the defendant, a manufacturer of pipe resin, had probable cause to file an earlier action against the plaintiff, an attorney for a pipe trade council. The underlying dispute between the parties arose out of documents relating to the safety of the proposed expanded use of plastic pipes for plumbing purposes. The prior action sought to enjoin an alleged trade libel that defendant's product contained a carcinogenic and to obtain a declaratory judgment that its product does not represent a danger to human health. The issue turns on whether, given the facts known to defendant, the prior action was legally tenable as a matter of law. We hold it was not because the constitutional guaranties of free speech prohibit a court from enjoining the dissemination of documents and information which formed part of the public debate on a matter of public health and safety.[1]

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[1] The First Amendment to the United States Constitution prescribes that "Congress shall make no law . . abridging the freedom of speech, . . . " The California Constitution contains a similar guaranty: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge

(Continued on following page)

A Defendant Shell Oil Company appeals from a judgment entered on a jury verdict in favor of plaintiff Raymond J. Leonardini awarding him compensatory damages in the amount of $197,000, and punitive damages in the amount of $5 million. Shell raises a number of objections to the judgment. It first argues that the trial court erred by directing a verdict against it on the probable cause issue and this error mandates reversal. Shell next claims that the court's instruction on probable cause misstated the law and was prejudicial. Its third contention is that the trial court committed reversible error in admitting expert legal testimony on probable cause. The fourth contention is that it was reversible error to admit evidence on the toxicity of certain fittings. The last two contentions relate to damages. Shell asserts that the compensatory damage award was both grossly excessive and unsupported by the evidence. Finally, it argues that the $5 million punitive damage award was excessive as a matter of law. We resolve the probable cause issue in favor of plaintiff in the published portion of this opinion. In the unpublished part we consider the remaining contentions. Finding no reversible error there we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This case began in a high stakes, public clash over the use of polybutylene pipe in this state for drinking water.

(Continued from previous page)

liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).) For convenience we use the term "First Amendment" in this opinion to refer not only to that provision of the United States Constitution but also to article I, section 2 of the California Constitution. (See Blatty v. New York Times Co. (1986) 42 Cal.3d 1033, 1049, fn. 4.)

Shell sought approval of the unrestricted use of the pipe without any environmental impact report. Plaintiff advocated that the public officials charged with the responsibility for health and safety independently test the pipe system before exposing Californians to potential health risks. How that struggle was waged is the story of this lawsuit.

Plaintiff is an attorney. After becoming a member of the State Bar of California, he worked for a number of years in the Department of Consumer Affairs. Ultimately, he attained the position of assistant cabinet secretary of the State Department of Consumer Affairs. Eventually plaintiff left government service to start a private practice in Sacramento. During all relevant periods plaintiff had one primary client, the California Pipe Trades Council (Council). The Council is an organization of plumbers' and pipe fitters' unions. Representatives of the Council advised plaintiff that hearings were scheduled to commence concerning the unrestricted use of plastic pipe for plumbing, including drinking water. Among other things, plaintiff was retained by the Council to represent it in connection with those plastic pipe proposals. Plaintiff then undertook to familiarize himself with the health and safety issues affecting plumbers and pipe fitters. He asserted that his primary concern centered on health and safety issues, although he conceded that increased competition from plastic pipes could be an economic issue with plumbers and pipe fitters. As part of his preparation, plaintiff assembled information about the health problems related to the installation and use of plastic pipes.

During 1979 and 1980 the Commission on Housing and Community Development (Commission) was considering the expanded use of plastic piping for potable (drinking) water purposes. The Commission held public hearings, invited public comment and debate and maintained a public record of all the material submitted to it on the question. In addition to written comments, the Commission also took testimony from officials of public agencies and others interested in or concerned with the use of plastic pipes. The Commission also retained its own scientific consultant, Dr. Marc Lappe, who was the head of the State Hazard Alert System. The essential question before the Commission was whether the state of scientific information was such that plastic pipe could safely be approved for carrying drinking water or whether independent testing was required. Shell and other manufacturers of plastic pipes and their components, as well as various representatives of trade associations, were active participants in these hearings. Shell and other supporters of the use of plastic pipes submitted various studies and scientific tests which they asserted showed that the pipe was safe and additional testing unnecessary.

The primary forms of plastic pipe at issue were PVC (polyvinyl chloride), CPVC (chlorinated polyvinyl chloride), and polybutylene. Plastic pipes are petrochemically based and most of the manufacturers of plastic piping are petrochemical companies. Shell apparently does not make plastic piping itself; it is, however, the only manufacturer of the resin which is the sole ingredient of polybutylene pipe. Polybutylene pipe differs from PVC and CPVC pipe in that it is flexible and does not use chemical solvents for

installation. Instead, it requires heat fusion or fittings for installation.

During the Commission's review a study was commissioned at the James Montgomery Laboratory (Montgomery) to test PVC and CPVC piping for leaching of chemicals which could have potential health effects. Polybutylene was not the subject of the testing by that laboratory because the ingredients of the piping, as revealed by Shell, did not "ring an alarm" concerning possible health hazards. But shell did not reveal to the state authorities that the polybutylene pipe system used an additional plastic, a polyacetal fitting with the trade name of Celcon, as a coupler. Mr. Steven Pregun, an organic chemist for Shell, in a letter to a customer, later described this coupling material as an "albatross" around the neck of the polybutylene pipe system. Shell's policy was that if the state did not discover any health problems with the system on its own and did not specifically ask for that information, Shell would not volunteer it.

The Montgomery study revealed that potentially hazardous chemicals could be leached into water from PVC and CPVC pipes. These chemicals were believed to be from the solvents used in installation and possibly from plasticizers added during manufacturing. These dangerous chemicals had never been disclosed to the State of California by the manufacturers of PVC or CPVC. Quite the contrary, they had represented to the state that the pipes were completely safe.

In the spring of 1980, Assemblyman Lou Papan of the California Legislature sponsored a concurrent resoiution asking the Commission to halt approval of plastic pipes

until such time as the Toxic Substance Alert System had made findings of its own. In a response foreshadowing the suit against plaintiff, Shell told one of its representatives that "they have a battery of attorneys to handle people like that and that they'll turn it over to their legal department." Shell in fact responded by sending a letter to Assemblyman Papan threatening to take "appropriate legal action" against him if he did not desist from lumping polybutylene with other plastics.

As a result of the Montgomery study and other information, the Commission in November 1980, ordered the preparation of an Environmental Impact Report (EIR) on the proposal for increased usage of PVC and CPVC pipes. It did not, however, require an EIR on the use of polybutylene pipe at that time. In the meantime plaintiff made an independent investigation to determine what studies, if any, had been done on PVC and CPVC. He contacted the National Sanitation Foundation and discovered their results were based upon tests made in 1955, dealt with inorganic chemicals and did not employ current technology. He personally visited both the federal Food and Drug Administration (FDA) and the Department of Environmental Protection and learned they had no information on the subject.

Following the Commission's determination, plaintiff arranged for California Analytical Laboratories, Inc. (CAL), an independent laboratory, to perform tests on polybutylene pipe. The tests were commissioned and paid for by the Council. Plaintiff testified that he had representatives of the Council deliver some polybutylene pipe to CAL. CAL then conducted tests on the pipe and on December 31, 1980, it prepared a report which was

submitted to plaintiff.[2] The report reflected analyses of two pieces of pipe. With respect to one of the pieces the report indicated the presence of bis (2-ethylhexyl) phthalate (BEHP), more commonly known as di(ethylhexyl) phthalate (DEHP), at estimated levels of 50 to 500 parts per million (ppm). The possible presence of DEHP in polybutylene pipe could raise health concerns since it had recently been shown to be carcinogenic when fed to rodents in high doses (3,000 to 12,000 parts per million. Plaintiff sent the December 31, 1980, report to Dr. Lappe. Dr. Lappe forwarded the report to the Commission, noting that the results were disturbing in view of the animal carcinogenicity of DEHP and Shell's representation that plasticizers such as DEHP were not used in polybutylene. At some time the Commission determined to hold further hearings on the use of polybutylene pipe.

As we have noted, Shell does not manufacture polybutylene pipe; it manufactures polybutylene resin which is the sole ingredient of the pipe. Shell's evidence established that DEHP is not added to the resin in the manufacturing process. Shell sells the resin in pellet form to extruders who utilize an extrusion process to turn the pellets into pipe. Nothing is added to the resin in this process. In fact, the National Sanitation Foundation promulgated rules for extruders to follow in order to retain approval as extruders, and those rules forbid the addition

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[2] The Environmental Protection Agency (EPA) has protocols for testing of water leachates. CAL has followed the EPA protocols thousands of times in analyses. However, the preparatory steps for the December 31, 1980, study were unusual and were done by CAL for the first time.

of any substance to the resin in the extrusion process. In preparation for the Commission hearings Shell obtained affidavits from the extruders to whom it sells resin stating that they do not add DEHP to the resin during the extrusion process.

Following the disclosure of the CAL report, Shell hired Radian Corporation (Radian) to test polybutylene pipe leachates. Shell provided four leachate samples to Radian, and no DEHP was detected in those samples. In a follow-up analysis Radian obtained pipe samples, performed the leaching experiments itself using both water and hexane, and found no DEHP beyond what were described as background levels.[3]

In preparation for the Commission hearings plaintiff had CAL prepare a review of the first Radian study which offered some criticisms of Radian's report. Plaintiff forwarded the review to the Commission. He also had CAL perform additional testing. One test on Celcon polyacetal pipe fittings, which may be used with polybutylene pipe but which are not polybutylene, was positive for

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[3] DEHP is used in a variety of products, such as Kleenex and toilet tissues, rubber gloves, rubber aprons, and cork stoppers. Shell's witness described it as ubiquitous to the environment, meaning that it can be found virtually anywhere. In one of its reports CAL agreed that DEHP is ubiquitous, and noted that two billion pounds are sold annually. For this reason it is not uncommon for background levels of DEHP to be detected during chemical analysis. While there was some dispute whether small amounts of DEHP reflected in some studies were background levels or actually reflect small amounts of DEHP associated with the pipe, no test duplicated the relatively high concentrations of DEHP (50-500 ppm) reflected in the December 31, 1980, CAL test.

DEHP and plaintiff forwarded the results to Commission. Five additional tests were performed for plaintiff on polybutylene pipe and each test was negative for DEHP. Additionally, CAL performed an analysis for a toxicologist retained by a San Mateo local plumbers' union with negative results for DEHP.

In conjunction with the hearings, plaintiff prepared a booklet entitled "Health Hazards Associated With Plastic Pipe, A Status Report." The report was written with the intent of explaining the nature of the hearings and the issues which were involved. Plaintiff caused this booklet to be submitted into the public record of the hearings. Attached as an exhibit to the booklet was a copy of the CAL report, dated December 31, 1980. Plaintiff also included in the booklet a chapter on the use of polybutylene pipe for potable water. He suggested that because polybutylene is part of the generic plastic pipe grouping it may have stabilizers and plasticizers added to it. The report went on: "In early 1981, the California Department of Health Services evaluated research on polybutylene pipe that for the first time, was not authorized and *not* submitted by Shell Chemical Company. The results were alarming. . . . In particular, the tests conducted by the California Analytical Laboratories found 50-500 ppm of DEHP (a known animal carcinogen) in the *pipe itself*. Subsequent tests on other polybutylene pipe used for flexible connections to plumbing fixtures also found DEHP. [¶] The results were all the more disturbing because the representative of Shell Chemical Company had testified on the public record that polybutylene did not use DEHP. . . . " (Emphasis in original.) Plaintiff quoted Dr. Lappe's letter, written immediately after he

received the December 31, 1980, CAL report, in which he indicated it was disturbing that the Commission had been given apparently misleading testimony by Shell concerning the ingredients of polybutylene pipe. With respect to the Radian tests, plaintiff stated that the tests were commissioned by Shell to counter the substantive findings of the CAL tests and, with reference to CAL's criticism of the Radian testing, he asserted the test was "so flawed as to be of little value."

Plaintiff gave about 80 copies of the booklet to his client, the pipe trades council for distribution. The Council "wanted to explain it to their members so they could understand the context of the controversy." He testified that he prepared the booklet and gave copies of it to the Council with the knowledge, and in fact with the intent, that it would be distributed to anyone who requested a copy. Nevertheless, he did not have any control or say over what the Council actually did with the copies of the booklet. He retained 12 copies in his office for distribution to anyone who desired one. Shell presented evidence that the booklet was the subject of widespread distribution by plaintiff and the Council.

On April 20, 1981, the Commission conducted a hearing to determine whether polybutylene pipe should be the subject of an EIR. At the hearing Dr. Lappe testified that he found the Radian test results reassuring that polybutylene pipe did not present a health risk due to DEHP. He followed his testimony with a letter to Commission confirming that view. Representatives of Shell appeared and opposed an EIR for polybutylene pipe. They suggested that a speedy resolution could be obtained by a set of additional tests to determine whether

there really was a cancer-causing material in polybutylene pipes made from its resin. Plaintiff opposed this approach. Instead, he sought to have an EIR prepared. "I wanted polybutylene plumbing systems to be tested by an independent governmental agency whose responsibility was to certify the health and safety of this product before it was put into use by the public." As plaintiff later testified, "[G]iven the reality that we are talking about water, we are not talking about shoes or neckties or something like that, we're talking about an element basic to life, that it is incumbent upon the government to rely upon independent tests, not the manufacturers, ... [¶] And it was my belief, and the belief of a lot of people that before you approve it, make sure you've asked and answered and tested that product as thoroughly as you can before you approve it."

The public dispute escalated to statewide, even national, proportions. Contestants on both sides of the issue were quoted in national newspapers and magazines. Editorials appeared in various newspapers. Opinion pieces were published on both sides in newspapers. Public officials joined in the debate and called for testing. Shell itself sent a letter to interested parties across the country telling them that the information about the polybutylene controversy "is part of the public record and is available to anyone who wishes to write us." Shell described the controversy as a "big lie" paid for by the plumbers.

But Shell, according to one of its disgruntled consultants to the polybutylene division, found that plaintiff "was being too effectual at hearings. And if he continued on the road that he was pursuing, he was going to wind

up getting polybutylene pipe in that same E.I.R. that he was suggesting needed to be concentrated PVC and solvent leaching problem with CPVC and PVC." Such a [sic] outcome, in Shell's view, would be a "total disaster." Shell's management became "very emphatic about doing whatever was necessary to see if they could eliminate [plaintiff] and his tenaciousness from the hearings." Plaintiff "was just really creating a hornet's nest and something needed to be done with him, . . . " That something, as we shall see, was the filing of a lawsuit in the federal court. In retrospect, Shell had correctly foreseen the difficulties because the Commission ultimately rejected its approach and ordered the preparation of an EIR on polybutylene pipe.

In 1981 additional, independent testing of polybutylene was conducted. The East Bay Municipal Utility District became concerned over reports of carcinogens in polybutylene pipe and conducted tests which were negative for DEHP. The United States Navy put a Florida base on bottled water while it tested its polybutylene piping system. The tests were negative for DEHP. Radian obtained pipe from the same lot as the pipe which had been tested by CAL in December 1980. Radian tested the pipe and sent pieces to four independent laboratories for testing. The results were negative for DEHP beyond background levels.[4]

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[4] Radian detected DEHP at levels less than one ppm, west Coast Technical Service detected DEHP of three ppm and less than one ppm in its blank, Systems Science and Software detected DEHP at two ppm, TRW reported less than one ppm in both the leachate and the blank, and Acurex Corporation reported no DEHP detected.

According to the testimony of Dr. Richard F. Schimbor, the former manager of Shell's polybutylene business, during the spring and summer of 1981 Shell began to receive reports of consumer fear over the reports that its product contained carcinogens. A number of polybutylene pipe extruders were reporting a substantial impact on their business. Additionally Shell obtained information that plaintiff was actively distributing the CAL report of December 31, 1980, as alleged proof that polybutylene pipe in fact contained substantial levels of DEHP. Among other things he sent the report to the Commission and also distributed or caused it to be distributed at a meeting of the International Association of Plumbing and Mechanical Officials, spoke with reporters, distributed his booklet from his office, and wrote to various local officials referring to "substantial evidence that polybutylene pipe contains toxic and carcinogenic chemicals."

In June 1981, Shell sent a mailgram to CAL and advised it that its report was being circulated in support of a claim that polybutylene pipe contained DEHP at dangerous levels. Shell sought to meet with representatives from CAL to discuss its report. CAL replied that it would not discuss the report with anyone but its client, and that if the report were being circulated Shell should discuss it with plaintiff. One of Shell's attorneys spoke with Dr. Lappe. According to Dr. Lappe: "Mr. Holliman called and spoke to me, I thought very candidly and personally, and said, Look there is some additional trouble that is brewing about this D.E.H.P. issue. [¶] He expressed some gratification about the way I was handling the issue at that time. And then said, however, there

are some boys in Houston – that was his phrase – who were playing hardball, and that also was his phrase, and that they are very concerned about people, specifically Mr. Leonardini, who are going on and describing D.E.H.P. as a health threat or publicly disclosing or discussing D.E.H.P. in what Mr. Holliman felt to be greatly exaggerated terms. [¶] And that it was beginning to hurt Shell economically to have these discussions and that something was going to have to be done to dampen or quiet these kinds of outspoken statements." Holliman also mentioned that there was talk about bringing a lawsuit.

In August 1981, Shell filed a complaint in the United States District Court for the Eastern District of California invoking the court's jurisdiction on grounds of diversity of citizenship. (28 U.S.C. § 1332.) The complaint sought to enjoin trade libel and to obtain declaratory relief against CAL and plaintiff. Shell made the following allegations in its complaint: It is the sole manufacturer of polybutylene resin which is processed into finished pipe. In November 1980, the Commission approved the use of polybutylene pipe as a conduit for potable water. In December 1980, CAL conducted tests and reported that polybutylene contained 50 to 500 ppm DEHP. Tests prior to the CAL tests had shown that DEHP can cause cancer in laboratory animals and at the levels reported by CAL the presence of DEHP in pipe could represent a danger to human health according to some studies. CAL reported its conclusions to plaintiff who thereafter willfully, intentionally, without justification or privilege, and in reckless disregard of the truth, published, communicated, and caused to be published and communicated the CAL report and material

findings thereof. The report was false as neither polybutylene resin nor the pipe tested contains DEHP. CAL and plaintiff had been informed that independent laboratory analysis had concluded that DEHP was not present in polybutylene pipe and was found, if at all, only in pipe leachate at levels associated with laboratory background environments and at levels not dangerous to human health. Defendant had asked CAL to retest polybutylene pipe but CAL had either refused to test or had failed to report results. CAL had twice been asked to retract its conclusions. CAL and plaintiff knew or reasonably should have known that third persons to whom they communicated their claims would rely upon it. CAL and plaintiff have disparaged and continue to disparage defendant's product by disseminating and publishing the report that polybutylene pipe made from defendant's resin contains DEHP. As a result prospective customers have been and will be deterred from buying polybutylene pipe and resin.

Shell sought an injunction to restrain CAL and plaintiff from further publishing and communicating CAL's results and conclusions regarding the presence of DEHP in polybutylene pipe. Shell also sought a declaratory judgment declaring that polybutylene resin and pipe does not contain DEHP in levels sufficient to present a danger to human health, at 50 to 500 ppm, or at all.

Leonardini filed an answer to the complaint and then hired independent counsel to represent him. Although he feared he would be deluged with such things as paperwork, interrogatories, depositions, and inspections of his records, Leonardini was never subjected to discovery or

other processes. During the fall of 1981 Shell was negotiating a settlement with CAL. In early 1982 Leonardini's attorney wrote to Shell's counsel to request a dismissal. Counsel replied that he expected to settle with CAL and would probably then dismiss as to Leonardini. Shell eventually entered into a settlement with CAL. Shell and CAL signed a mutual release and agreed to a joint statement. The joint statement stated that the December 31, 1980, report was intended only as a survey for the gross presence of substances in the particular samples tested and was not intended to reflect exact amounts of particular substances in the samples or in polybutylene pipe in general. CAL acknowledged that its findings were the result of testing of one sample and recommended that further testing be conducted before definitive conclusions were drawn. CAL stated that it has no opinion whether polybutylene pipe presents a hazard to human health and no opinion whether DEHP exists in polybutylene pipe in general. Shell stated that it has no reason to believe that CAL is other than a responsible, independent laboratory.

Leonardini then filed a motion to dismiss the complaint. He argued there that Shell's claim for injunctive relief failed to state a claim because an injunction would constitute an unconstitutional prior restraint on freedom of speech and because the statements in question were absolutely privileged. He further argued that the claim for declaratory relief similarly failed because there was no case or controversy alleged and because declaratory relief was inappropriate where the issue was already the subject of administrative proceedings. Shell filed opposition to the motion, but then filed its own motion to dismiss the action as to Leonardini. That motion was

granted on May 10, 1982. On April 15, 1983, Leonardini filed this action for malicious prosecution.

As we have recounted, the jury found in favor of Leonardini. It awarded him damages of $22,000 for attorney fees incurred in the federal action, $175,000 general damages, and $5 million punitive damages. Shell's motion for new trial was denied and this appeal followed.

DISCUSSION

I

Probable Cause to File Federal Lawsuit

Plaintiff's theory of this case is that Shell filed its federal lawsuit against him for an improper purpose and with an ulterior motive. Plaintiff asserts that Shell wished polybutylene pipe to be approved without public scrutiny of its health consequences and to that end filed the suit to muzzle his advocacy, or to prevent him from stumbling onto the trioxane problems involved with polyacetal fittings. To further this malicious aim, Shell filed the federal action without probable cause.

It is in this context that Shell argues that the trial court, as a result of its misapprehension of the law of probable cause in an malicious prosecution action, erroneously directed a verdict against it on this issue. In doing so, according to Shell, the court ignored established law which mandates that the jury determine the facts underlying probable cause before the court decides the legal issue. As Shell sees it, numerous factual conflicts

existed about the accuracy, truth, distribution and privileged nature of plaintiff's statements which should have been resolved by the jury. Moreover, even if there were no factual conflicts, the court still erred in directing a verdict on probable cause because there was a reasonable basis to bring the trade libel action. In Shell's view, plaintiff committed a trade libel against it for which injunctive relief was an appropriate remedy. Finally, it claims that its declaratory relief cause of action was also brought properly. We begin with the determination of probable cause.

A. Probable Cause Determination

Following the presentation of evidence the trial court granted plaintiff's motion for a directed verdict on the issue of probable cause to bring the federal action.[5] The court instructed the jury that plaintiff was required to prove that Shell acted without probable cause and with malice in initiating the federal court action. On the question of probable cause the court instructed: "To constitute probable cause for the initiation or maintenance of the Federal civil suit against the plaintiff in this case, the evidence must establish: [¶] One, Shell . . . had an actual, honest, and good faith belief in that action it brought. [¶] Two, that such belief if held by Shell . . . was a reasonable

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[5] Code of Civil Procedure section 630 authorizes the making of a motion for directed verdict after all the parties have completed the presentation of all their evidence. The statute further provides that "[i]f it appears that the evidence presented supports the granting of the motion as to some, but not all, of the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed on any remaining issues." (Code Civ. Proc., § 630, subd. (b).)

belief based upon the facts and the law. [¶] In its Federal suit against [plaintiff], Shell sought an injunction to prevent further dissemination of the California Analytical Laboratory report dated December 30, 1980, which report had been entered into the public record of the State of California and involved a matter of public debate and controversy. [¶] Shell['s] . . . suit further sought a declaration by the court concerning the presence or absence of D.E.H.P. in its resin or in pipe made by others from its resin. [¶] The law of the State of California and of the United States does not permit any court to issue an injunction to prevent the dissemination of such a report under the circumstances shown by the evidence in this case. [¶] Further, the declaratory relief sought or claimed as a basis for Shell's Federal suit could not legally be used for a finding of a scientific fact by a court in the manner in which Shell's action sought the use of such relief. [¶] Accordingly, you are instructed that this Court finds, as a matter of law, that there was no probable cause for the bringing of the Federal suit brought by Shell . . . against [plaintiff]."

Following the probable cause instruction the court instructed on the issue of malice: "The words malice and malicious mean a wish to vex, annoy, or injure another person. [¶] Malice means the attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose. [¶] Malice, like any other fact, may be proved by direct or circumstantial evidence. [¶] This Court having found that [Shell] lacked probable cause for initiating the Federal proceeding against plaintiff. . . . , you may infer that Shell . . . acted with malice."

In a malicious prosecution action the plaintiff must prove that the prior action (1) was commenced by or at the defendant's direction and terminated in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (Bertero v. National General Corp. (1974) 13 Cal.3d 43, 50.)[6] Malicious prosecution is a disfavored action. (Babb v. Superior Court (1971) 3 Cal.3d 841, 847; Cooper v. Pirelli Cable Corp. (1984) 160 Cal.App.3d 294, 298. See also Bertero v. National General Corp., supra, 13 Cal.3d at p. 53.) This is due to the principles that favor open access to the courts for the redress of grievances. In fact, it has been held that access to the courts is a constitutional right founded upon the First Amendment to the United States Constitution. (California Transport v. Trucking Unlimited (1972) 404 U.S. 508, 510-511 [30 L.Ed.2d 642, 646]; Taylor Drug Stores v. Associated Dry Goods (1977) 560 F.2d 211, 213; Pennwalt Corp. v. Zenith Laboratories, Inc. (1979) 472 F.Supp. 413, 424.) But regardless of any constitutional basis for the policy, it is beyond dispute that the strong public policy of this state favors open access to the courts for the

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[6] There is a division of authority among various jurisdictions on the question of whether the malicious prosecution plaintiff is required to prove special damages or may seek general damages. (See 1 Harper, James & Grey, The Law of Torts (2d ed. 1986) § 4.8, pp. 457-477.) In jurisdictions which require proof of special damages it is generally held that an action for injunctive relief, in which no preliminary injunction or temporary restraining order is actually obtained, cannot give rise to a malicious prosecution action. (See Annot., Malicious Prosecution – Injunction (1976) 70 A.L.R.3d 536.) In this state general damages may be claimed in a malicious prosecution action. (Bertero v. National General Corp., supra, 13 Cal.3d at p. 59.)

resolution of conflicts. (Grindle v. Lorbeer (1987) 196 Cal.App.3d 1461, 1467; Norton v. Hines (1975) 49 Cal.App.3d 917, 922.) "The courts of the state are open to every citizen for the redress of his wrongs, and unless he is at liberty to seek such redress without rendering himself liable in damages to the defendant, in case he shall fail to establish his complaint, this right would in many instances be a barren privilege." (Asevado v. Orr (1893) 100 Cal. 293, 297.) Accordingly, litigants have the right to present issues that are arguably correct even if it is extremely unlikely they will win. (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 650; See also Williams v. Coombs (1986) 179 Cal.App.3d 626, 640.) In view of these considerations the California Supreme Court has recently refused to abandon or relax traditional limitations on malicious prosecution recovery. (Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 863-874.)

The disfavored nature of the tort of malicious prosecution does not mean that a litigant should be deprived of a legitimate cause of action through arbitrary limitations. (Jaffe v. Stone (1941) 18 Cal.2d 146, 159-160.) The public policy involved has served to place strict limitations on the elements of the tort and to require judicial determination of whether the prior action lacked probable cause. (*Id.* at p. 159; Cooper v. Pirelli Cable Corp., supra, 160 Cal.App.3d at p. 298; Norton v. Hines, supra, 49 Cal.App.3d at pp. 922-923.) The public policy is served by adherence to the strict requirement that the plaintiff prove each of the necessary elements of the tort and by careful consideration of the probable cause issue by the court so that recovery is not permitted for mere negligence in bringing an action (*ibid.*), or simply because the

action was not successful (Vesper v. Crane Co. (1913) 165 Cal. 36, 41). But when a plaintiff can prove each of the essential elements of malicious prosecution, then the assertion that the tort is disfavored will not bar relief. (Jaffe v. Stone, supra, 18 Cal.2d at p. 159. See also Bertero v. National General Corp., supra, 13 Cal.3d at p. 53.)

Plaintiff expended much effort in the trial court and on appeal attempting to define the issues as he perceived them. He asserts that the case is not about DEHP or other chemicals. To the extent he considers chemicals to be in issue he focuses on polyacetal fittings and trioxane rather than DEHP in polybutylene pipe. "This case," he avers, "is not about chemicals. Nor is it about the dangers presented to the public by the unrestricted use of plastic pipe for drinking water. While such dangers are serious and form the backdrop against which this case was tried, the issues below are more fundamental to our society than the dangers posed to millions of Californians by toxic chemicals in their drinking water. [¶] The Shell Oil Company advocated, in California, the unrestricted use of a polybutylene pipe system for drinking water in homes without *any* testing whatsoever by public officials. Ray Leonardini advocated that the public bodies charged with the responsibility for health and safety independently test and examine the polybutylene pipe system before exposing millions of Californians to the unknown consequences of such use. In the midst of the ongoing public debate regarding the policies that California governmental bodies should follow, the Shell Oil Company sued its most effective political opponent and the independent and reputable laboratory that provided him technical and scientific assistance." He goes on to portray

Shell as a huge and evil corporation attempting to foist a dangerous product on the public; Shell sued him because he was an obstacle to that purpose and could have stumbled onto the real problem (polyacetal). However, these claims are only relevant on the question of malice. The probable cause determination, which is an essential element of a cause of action for malicious prosecution, must be based upon the prior action which was in fact instituted by Shell. And the prior action was about, and was only about, plaintiff's dissemination of the claim that polybutylene pipe contains high levels of DEHP.

The probable cause element of a malicious prosecution action requires an objective determination of the "reasonableness" of the defendant's prior lawsuit, i.e., whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. (Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at pp. 868, 886.) A lack of probable cause is an element separate from the requirement of malice. While a lack of probable cause may be inferential evidence of malice, the converse is not true; a lack of probable cause cannot be inferred from a showing of malice. (Williams v. Coombs, supra, 179 Cal.App.3d at p. 639, fn. 8.) "This is so because even 'though malice is inferred from want of probable cause, still where probable cause does exist, malice, even affirmatively shown, will not entitle the plaintiff to a verdict.' " (*Ibid.*, quoting from Lacey v. Porter (1894) 103 Cal. 597, 607.) In other words, when the prior action was objectively reasonable the malicious prosecution defendant is entitled to prevail regardless of his subjective intent. "If the court determines that there was probable

cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated." (Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at p. 875.)

In considering the issue of probable cause there is an analytical dichotomy which arises due to the factual/legal duality involved in virtually all lawsuits. In a typical case the merits of the lawsuit depend upon the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action if he relies upon facts which he has no reasonable cause to believe to be true, or seeks recovery upon a legal theory which is untenable under the facts known to him. The probable cause analysis may differ depending upon where the alleged deficiency lies. Here, only the latter deficiency is implicated and thus the question is whether Shell had probable cause to file its federal lawsuit on the facts known to it.

In any lawsuit the courts must determine whether relief is legally available on the facts established. In a malicious prosecution action the legal aspect of probable cause requires a determination whether the prior claim for relief was legally tenable. (Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at pp. 885-886.) Consideration of this question requires that the court take account of the evolutionary potential of legal principles and any uncertainty which might be embedded there. (*Ibid.*) "To hold that the person initiating civil proceedings is liable unless the claim proves to be valid, would throw an undesirable burden upon those who by advancing claims not heretofore recognized nevertheless aid in making the law consistent with changing conditions and

changing opinions. There are many instances in which a line of authority has been modified or rejected. To subject those who challenge this authority to liability for wrongful use of civil proceedings might prove a deterrent to the overturning of archaic decisions." (Rest.2d Torts, § 675, com. f, at p. 460. See also Williams v. Coombs, supra, 179 Cal.App.3d at p. 640.) In order to avoid chilling the assertion of novel or debatable legal claims the California Supreme Court has adopted, with appropriate modifications, the standard for determining whether an appeal is frivolous (In re Marriage of Flaherty, supra, 31 Cal.3d at p. 650), as the standard for determining probable cause in a malicious prosecution action. (Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at p. 885-886.) Under this standard a claim is not lacking in probable cause if any reasonable attorney would have thought the claim tenable. (*Ibid*. See also Murdock v. Gerth (1944) 65 Cal.App.2d 170, 179 [applying a "fairly debatable" standard].)

In malicious prosecution actions the courts have seldom expressly recognized that the factual/legal aspects of the prior suit require a factual/legal analysis of the probable cause issue. Instead the factual/legal dichotomy implicit in prior actions has found expression in an inappropriate "objective/subjective" view of probable cause. This in turn has led to confusion over the proper roles of the court and jury in the probable cause determination. Specifically, some appellate decisions have indicated that probable cause is a mixed objective/subjective standard; the objective part to consider whether a reasonable person would have believed in the merits of the claim and the subjective part to focus upon whether the malicious

prosecution defendant honestly believed in the merits of the claim. (See Bertero v. National General Corp., supra, 13 Cal.3d at p. 55; Franzen v. Shenk (1923) 192 Cal. 572, 576.) The subjective portion, involving as it would the defendant's state of mind, was regarded as a factual issue for the jury. (*Ibid.*)

In Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d 863, the Supreme Court rejected the objective/subjective approach to a probable cause determination. Probable cause is to be determined in all instances by an objective standard, that is, whether the prior action was objectively reasonable.[7] If it was objectively reasonable

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[7] In *Sheldon Appel*, the Supreme Court was considering a malicious prosecution action brought against the attorneys who filed the prior action rather than their client, the actual plaintiff in the action. The standard for the plaintiff client may be somewhat different. In Anderson v. Coleman (1880) 56 Cal. 124 at pages 126 and 127, a concurring justice suggested that a plaintiff can never be held liable for malicious prosecution if he hired an attorney to file the action and had cause to believe the facts relied upon. This suggestion has not been accepted, however. Rather, it has been held that actual and good faith reliance upon the advice of counsel is a complete defense only if full disclosure of the facts was made. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 449, pp. 533-534.) In this case Shell did not rely upon the advice of counsel as a defense, but no reason appears to hold it to a more stringent standard than an attorney would be held to in evaluating the legal tenability of the prior suit. In fact, in *Sheldon Appel*, the court adopted the legal tenability standard to afford litigants and their attorneys protection from subsequent tort liability. Accordingly, we believe the legal tenability standard is the appropriate measure of probable cause to apply to the plaintiff in the former action who does not rely upon advice of counsel as a defense.

then the defendant is entitled to judgment in the malicious prosecution action regardless of what his subjective belief or intent may have been. (*Id.* at pp. 878-879.) Of course, there may be factual questions which require resolution before the objective standard can be applied. For instance, there may be evidentiary disputes over the information and facts known to the defendant when it brought the prior action or it may be claimed the defendant was aware of information that established the lack of truth in his factual allegations. In such circumstances the threshold question of the state of the defendant's knowledge of the facts must be resolved by the jury before application of the objective probable cause standard. But when the state of the defendant's knowledge of the facts has been determined or is undisputed then his subjective belief in the legal validity of his claim is irrelevant and the only question is whether, based upon his knowledge, his action was objectively reasonable. (*Id.* at p. 881.) That determination is always to be made by the court and not by the jury. (*Ibid.*)

Shell contends that there are many factual conflicts regarding whether plaintiff committed a trade libel by the publication of the CAL report. For instance, does polybutylene pipe contain DEHP, did the CAL report reflect a scientifically valid test, did the report disparage Shell's product, did plaintiff distribute the report knowing it to be false and if so, to what extent did he distribute it? Shell argues that the jury and not the court should have resolved these factual conflicts. This contention misses the probable cause point. The only relevant factual question was the state of Shell's knowledge at the time it filed the federal lawsuit. "When there is a dispute as to the

state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, *Franzen, supra,* 192 Cal. 572, and similar cases hold that the jury must resolve the threshold question of the defendant's factual knowledge or belief. . . . As Chief Justice Taft's explanation of the probable cause element indicates, however, the jury's factual inquiry into the defendant's belief or knowledge is not properly an inquiry into 'whether [the defendant] thought the facts to constitute probable cause'; when the state of the defendant's factual knowledge is resolved or undisputed, it is the court which decides whether such facts constitute probable cause or not." (Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at p. 881, citations omitted.) In this case the state of Shell's factual knowledge was undisputed. Consequently, the probable cause analysis was limited to the legal question. Under these circumstances, "the probable cause issue is properly determined by the trial court under an objective standard; . . . " (*Ibid.*)

Shell next argues that even if the judge properly decided the question of probable cause, his instruction to the jury misstated the law and was both argumentative and prejudicial. Although the instruction was prolix, it did serve its function of informing the jury that the "Court finds, as a matter of law that there was no probable cause for the bringing of the Federal suit brought by the Shell Oil Company against Raymond J. Leonardini." Whether the instruction misstated the law and hence was prejudicial to Shell depends upon whether the trial court correctly concluded that Shell lacked probable cause to bring its federal lawsuit against plaintiff. It is to that issue that we next turn.

Before addressing the probable cause question it is necessary to note that we reject plaintiff's attempt to construe Shell's federal complaint with undue rigidity. Three sound but separate policies compel liberality in construction of the pleadings. First, we have already noted the policy which favors open access to the courts for the resolution of conflicts. This policy is inconsistent with a rigid construction of the prior pleadings to support a malicious prosecution action. Second, the law favors the early resolution of disputes, including voluntary dismissal of suits when the plaintiff becomes convinced he cannot prevail or otherwise chooses to forego the action. This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action. (See Asevado v. Orr, supra, 100 Cal. at pp. 298-299.) Finally, and in any event, in this state pleadings are required to be liberally construed in favor of the pleader. (Code Civ. Proc., § 452; 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 396, pp. 446-447.) The factual allegations of the complaint are controlling over the title or label given the pleading and over the prayer or demand for relief. (*Id.*, § 405, p. 454.) In these respects federal rules of pleading are similar. (*Id.*, §§ 333, 367, pp. 383-385, 420-421.) Together these policies compel the conclusion that Shell's federal complaint must be construed liberally in determining whether the action was legally tenable.

While we reject plaintiff's effort to construe the pleading with undue rigidity, we do not imply that a defendant can avoid liability for malicious prosecution by

pointing to some undisclosed and unlitigated, but tenable, claim for relief. (Williams v. Coombs, supra, 179 Cal.App.3d at p. 644.) Probable cause for the initiation of an action depends upon the legal tenability of the action which was actually brought. (*Ibid.*) We hold only that in assessing the tenability of the action which was brought the complaint must be construed liberally in favor of the pleader rather than restrictively in favor of the malicious prosecution plaintiff.

In its federal court complaint Shell sought an injunction enjoining plaintiff "from further publishing and communicating CAL's test results and conclusions regarding the presence of DEHP in polybutylene pipe." It also sought a declaratory judgment that polybutylene resin and pipe "does not contain concentrations of DEHP at levels sufficient to represent a danger to human health, or at 50-500 parts per million, or at all." In Shell's view, the complaint as reasonably construed charges plaintiff with disparagement of Shell's product by falsely claiming it contains carcinogenic chemicals and thus it seeks to enjoin future disparagement and to obtain a declaration that plaintiff's conduct was tortious. It is these claims upon which the probable cause determination must be based.

We agree with plaintiff that Shell cannot avoid liability for malicious prosecution by asserting that plaintiff's conduct would have left him vulnerable to a trade libel suit for money damages. It is generally true that when a complaint seeks equitable relief which is unavailable the complaint will still state a cause of action if it shows a right to money damages. (4 Witkin, Cal. Procedure, Pleading, supra, pp. 63-65.) However, a cause of

action for damages for trade libel requires pleading and proof of special damages in the form of pecuniary loss. (Guess, Inc. v. Superior Court (1986) 176 Cal.App.3d 473, 479.) Shell neither plead, nor attempted to prove, specific pecuniary loss. Consequently, the determination whether Shell had probable cause for its action must focus upon its request for injunctive and declaratory relief rather than upon some unasserted claim for monetary damages.

B. Probable Cause to Bring Action for Trade Libel

The Restatement of Torts, Second has described the tort of "trade libel" as "[t]he particular form of injurious falsehood that involves disparagement of quality . . . . " (Rest.2d Torts, § 626, com. a, at p. 346.) It is there defined as "the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property." (Rest.2d Torts, § 626, p. 345.) California has adopted the Restatement formulation. (Erlich v. Etner (1964) 224 Cal.App.2d 69, 73.) Trade libel has also been defined as encompassing all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so. (Comment, Development in the Law, Competitive Torts (1964) 77 Harv.L.Rev. 888, 893.)

In the view of one reviewing court, trade libel "is a confusing concept that has not been subjected to rigorous judicial analysis in California." (Polygram Records, Inc. v. Superior Court (1985) 170 Cal.App.3d 543, 548.) Be that as

it may, it is nonetheless a well recognized tort in this state. (See, e.g., Hoffman Co. v. E. I. Du Pont de Nemours & Co. (1988) 202 Cal.App.3d 390, 397; Guess, Inc. v. Superior Court, supra, 176 Cal.App.3d at p. 478-479; Nichols v. Great American Ins. Companies (1985) 169 Cal.App.3d 766, 773; Erlich v. Etner, supra, 224 Cal.App.2d at p. 73; 5 Witkin, Summary of Cal. Law Torts, supra, pp. 661-671; 3 Levy, Golden & Sacks, Cal. Torts, § 40.70 et seq., pp. 40-121-40-127.) To constitute trade libel, a statement must be false, but need not be malicious except in the sense that it was not privileged. (See Gudger v. Manton (1943) 21 Cal.2d 537, 543, disapproved on other grounds in Albertson v. Raboff (1956) 46 Cal.2d 375, 381.)

Although there is some misleading similarity, trade libel must be distinguished from the defamatory torts of libel and slander. "Thus, despite the fact that what has come to be known as 'trade libel' is similar to defamation in that both involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff, the two torts are distinct; that is, 'trade libel' is not true libel and is not actionable as defamation." (Polygram Records, Inc. v. Superior Court, supra, 170 Cal.App.3d at p. 549.) The basic difference between the two torts, it has been noted, is that an "action for defamation is designed to protect the *reputation* of the plaintiff, and the judgment vindicates that reputation, whereas the action for disparagement is based on *pecuniary damage* and lies only where such damage has been suffered." (5 Witkin, Summary of Cal. Law, Torts, supra, pp. 661-662, emphasis in original.)

In its federal court action, Shell complained that plaintiff was disseminating the false claim that its polybutylene products contained DEHP at hazardous levels. Despite the jury's finding of malice in bringing the lawsuit, we think Shell had reason to believe plaintiff's claims were not true. It does not add DEHP to polybutylene resin, which is the sole ingredient of polybutylene pipe. Nothing is added to the resin in the extrusion process and in fact National Sanitation Foundation rules forbid the addition of any substance during the extrusion process. Shell obtained affidavits from its extruder customers stating that they do not add DEHP to polybutylene and in fact do not have DEHP in their extrusion plants. Moreover, Shell could reasonably believe that the CAL test was an anomaly. Numerous other scientific tests of which plaintiff and Shell were aware failed to identify DEHP associated with polybutylene pipe at other than background levels, if at all, and certainly not approaching the relatively high concentrations asserted by plaintiff.

Notwithstanding this assessment, Shell did not make out a claim for trade libel. First, Shell neither alleged nor sought pecuniary damages in its federal complaint attributable to Leonardini's dissemination of the CAL report or any of its contents. The claimed damages, according to the complaint, proximately resulted not from Leonardini's actions but rather from "CAL's publication of its report and its later refusal to reconsider it, . . . " Second, Shell alleged that plaintiff had disseminated the CAL report or its material findings "from on or about January, 1981 to the present," a period which encompassed the hearings before the Commission. The Commission was a

public body created by the Legislature and charged with the duty of conducting hearings and making recommendations on the plastic pipes, the subject of the CAL report. Accordingly, the allegations embrace communications which are arguably privileged and which could not form the basis of a trade libel. (Cf. Block v. Sacramento Clinical Labs, Inc. (1982) 131 Cal.App.3d 386.) Lastly, even if Shell might have had a claim for damages, that fact would not defeat a malicious prosecution action predicated upon the untenable claim for injunctive relief. A malicious prosecution action "lies when but one of alternate theories of recovery is maliciously asserted. . . . " (Bertero v. National General Corp., supra, 13 Cal.3d at p. 57, fn. 5; see also Balog v. LRJV, Inc. (1988) 203 Cal.App.3d 1343, 1352-1357.) Thus, the probable cause question in this case is a more narrow one, and turns on whether injunctive and declaratory relief was available under the circumstances of this case.

One of the important differences between trade libel on the one hand and defamation on the other, is said to be that "because of the economic interest involved, the disparagement of quality may in a proper case be enjoined, whereas personal defamation can not [*sic*]." (Rest.2d Torts, § 626, com. b, p. 346.) The crux of this appeal, therefore, is whether the trade libel action filed by Shell in the federal court was a proper case for injunctive relief. Shell claims that an injunction was available as a remedy for the alleged trade libel committed by plaintiff and that it had probable cause to seek that relief. In support of its position, Shell first cites to the quoted Restatement comment that a trade libel may be enjoined in a proper case. But it fails to note the Restatement's

discussion of the constitutional constraints on the issuance of injunctions. "One of the public interests most frequently encountered in the determination of the appropriateness of injunction against tort is that [sic] in the freedom of speech and of the press. The public interest, long established in common-law policy, is today held to be embodied in the First Amendment and made applicable to the states by the Fourteenth Amendment. . . . [¶] These constitutional restrictions have in recent years materially affected certain substantive rules of the law of torts. . . . [¶] Since the decision of the Supreme Court in Near v. Minnesota, (1931) 283 U.S. 697, it has been recognized that there are constitutional restrictions that must be considered before an injunction may be granted against the exercise of speech. Prior restraint of certain types of communications runs afoul of the restrictions of the First Amendment, even though the enjoined conduct would be tortious in nature." (Rest.2d Torts, § 942, com. e, p. 588.)

In further support of its claim to entitlement of injunctive relief, Shell relies upon the statement in Witkin that "[a]n injunction may be granted to protect various kinds of interests in business and personal property. The following are important examples: . . . (i) Trade libel. (See 6 U.S.F. L.Rev. 418.)" (6 Witkin, Cal. Procedure, Provisional Remedies (supra) pp. 226-227.) But the cited law review article, dealing with preliminary injunctions against trade libel, notes that the "courts use the traditional rule that equity will not enjoin a personal libel when ruling that a preliminary injunction against trade libel is unobtainable. As already noted, the main ground for refusing to grant the preliminary injunction is that the

constitutional guarantees of freedom of the press and freedom of speech would be infringed." (Comment, The Availability of Preliminary Injunctions Against Trade Libel (1972) 6 U.S.F. L.Rev. 418, 419-420, fn. omitted.)

Shell's final support for its claim is placed on the cases of Martin v. Reynolds Metals Company (D.Ore. 1963) 224 F.Supp. 978, and Black & Yates v. Mahogany Ass'n (3rd Cir. 1942) 129 F.2d 227. But the first case manifests the same constitutional concern. In *Martin*, the owner of an alumina reduction plant sought a preliminary injunction requiring removal of a large billboard sign on a nearby ranch, proclaiming that poison from the plant killed cattle and endangered human health. Recognizing that the majority American rule is that equity will not enjoin a trade libel, the *Martin* court nonetheless concluded that an injunction may be proper in an appropriate case. In its view, "[i]n considering whether equity will enjoin trade libel (libel of a business or property interest), the better-reasoned opinions weigh two factors: [¶] 1) The adequacy or inadequacy of the remedy at law; and [¶] 2) The possible encroachment on free speech which might result from the injunction." (*Id.* at p. 984.) Citing Near v. Minnesota, the court conceded that equity will not enjoin a trade libel because "where the publication is about something which is of public interest, then the party libeled must turn to law for his relief." (*Id.* at p. 985.) Concluding that the conduct at issue was not a matter of public interest because the sign was an outgrowth of a controversy between two private parties, dealt with only the interests of those parties and was erected to publicize the rancher's lawsuit against the plant owner, the *Martin* court ruled that an injunction

was proper. (*Ibid.*) But implicit in the *Martin* court's formulation of the rule is that if the issue had been one of public interest, injunctive relief would not have been available. The second case relied upon by Shell, Black & Yates v. Mahogany Ass'n, supra, 129 F.2d 227, did not deal with any public interest questions and hence casts no light on the issue in this case. It merely held that an ordinary trade libel may be enjoined and does not purport to deal with the constitutional issues posed by this case.

This brings us to the crux of plaintiff's case. Plaintiff asserts that the prior action was without any basis because the primary relief sought, an injunction, would constitute a prior restraint against speech in violation of the free speech clause of the First Amendment which, plaintiff maintains, is never permissible.[8]

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[8] Shell wisely does not claim that the challenged report constitutes a form of commercial speech, thereby entitling it to less protection under the First Amendment. (See Va. Pharmacy Bd. v. Va. Consumer Council (1976) 425 U.S. 748, 770-773 [48 L.Ed.2d 346, 363-365].) The test for identifying commercial speech is whether the publication in question may be said to do no more than "propose a commercial transaction." (Bd. of Trustees v. Fox (1989) 492 U.S. ___, ___ [106 L.Ed.2d 388, 398]; Pittsburgh Press Co. v. Human Rela. Comm. (1973) 413 U.S. 376, 385 [37 L.Ed.2d 669, 677].) The report in this case clearly does not propose a commercial transaction. Moreover, the fact that the report may have economic consequences does not convert it into commercial speech. As the California Supreme Court has observed, "commercial motivation does not transform noncommercial speech into commercial speech." (Blatty v. New York Times Co. (1986) 42 Cal.3d 1033, 1048, fn. 3, citations omitted.)

It is now widely recognized that "[c]onstitutional defenses based on the First Amendment rights of freedom of the press and free speech apply to all cases based on an injurious falsehood regardless of whether the false statement relates to the plaintiff personally or to plaintiff's property." (3 Levy, Golden & Sacks, Cal. Torts (1989) Trade Libel, § 40.76[4], p. 40-126.1.) As the California Supreme Court explained it, "[t]he fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not solely to those labeled 'defamation' is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values." (Blatty v. New York Times Co., supra, 42 Cal.3d at p. 1043.) Consequently, all causes of action "hav[ing] as their gravamen the alleged injurious falsehood of a statement . . . must satisfy the requirements of the First Amendment." (*Id.* at p. 1045.)

It is indisputable that publications designed to influence government constitute a form of communication protected by the First Amendment. In the words of the United States Supreme Court, "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that

changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' " (New York Times Co. v. Sullivan (1964) 376 U.S. 254, 269 [11 L.Ed.2d 686, 700], citations omitted.)

Moreover, it has been repeatedly held by the federal high court that the First Amendment generally prohibits prior restraints upon the freedom of speech and of the press.[9] (See, e.g., Organization for a Better Austin v. Keefe (1971) 402 U.S. 415, 419-420 [29 L.Ed.2d 1, 5-6]; Carroll v. Commissioners of Princess Anne (1968) 393 U.S. 175, 181 [21 L.Ed.2d 325, 331]; Bantam Books v. Sullivan (1963) 372 U.S. 58, 70 [9 L.Ed.2d 584, 593]; Near v. Minnesota ex rel.

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[9] Professor Tribe has noted that only rarely has the United States Supreme Court "acknowledged the central feature of prior restraints: the doctrine imposes a special bar on attempts to suppress speech prior to publication, a bar that is distinct from the scope of constitutional protection accorded the material *after* publication. . . . A frequent pitfall of both courts and commentators is to employ the doctrine in cases involving expression clearly within the first amendment guarantees, in ignorance of the fact that '[w]here the speech in question is in all events guaranteed by the First Amendment, attributing that guarantee to the circumstance of prior restraint is at best irrelevant and often misleading.' " (Tribe, American Constitutional Law (2d ed. 1988) Communication and Expression, § 12-34, pp. 1040-1041, emphasis in original.) Because the right to recover damages for a trade libel was never tendered in this case, we have no occasion to examine whether the dissemination of the CAL report was protected by the First Amendment in all events and thus could not constitute the basis for a monetary recovery of damages for a trade libel. It is sufficient for our purposes to conclude that dissemination of the report and its information could not be enjoined under the circumstances of this case.

Olson (1931) 283 U.S. 697, 715-716 [75 L.Ed. 1357, 1367].) In *Near*, the seminal prior restraint decision, the court held that a state statute authorizing an action to enjoin, as a public nuisance, statute authorizing an action to enjoin, as a public nuisance, the publication or the circulation of any "malicious, scandalous and defamatory" newspaper or other periodical violated the First Amendment. The high court declared that "it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication." (*Id.* at p. 713.) "These principles have retained their vigor from 1931 to date. From *Near* to *Times-Picayune Pub. Corp. v. Schulingkamp* (1974) 419 U.S. 1301, 1307 [42 L.Ed.2d 17, 22, 95 S.Ct. 1], it has been consistently held that any prior restraint on expression bears a heavy presumption against its constitutional validity." (Wilson v. Superior Court (1975) 13 Cal.3d 652, 657.) Underlying the First Amendment's prohibition against prior restraints is the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, . . . " (New York Times Co. v. Sullivan, supra, 376 U.S. at p. 270.)

In the context of prior restraints and public debate on a matter of public interest, the truth of the statement is irrelevant. "It is elementary, of course, that in a case of this kind [involving an injunction against the distribution of leaflets concerning plaintiff's real estate practices in an urban neighborhood] the courts do not concern themselves with the truth or validity of the publication." (Organization for a Better Austin v. Keefe (1971) 402 U.S. 415, 418 [29 L.Ed.2d 1, 5].) This and other cases of the United States Supreme Court "leave no doubt that the

truth or falsity of a statement on a public issue is irrelevant to the question whether it should be repressed in advance of publication. . . . [¶] The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form." (Wilson v. Superior Court, supra, 13 Cal.3d at pp. 658-659.)

To be sure, the *Wilson* court acknowledged that the decisions recognize prior restraints may be imposed under some extraordinary circumstances. Thus "an injunction restraining speech may issue in some circumstances to protect private rights or to prevent deceptive commercial practices." (13 Cal.3d at p. 662, citations omitted.) But the underlying dispute between plaintiff and Shell over governmental approval of polybutylene pipe for domestic purposes does not involve private rights between two warring litigants; rather, it is concerned with a public safety and health issue which potentially touches all of the residents of California. Nor does this case involve deceptive commercial practices. Plaintiff is not selling any product, much less a competing pipe or resin. And even if the Council could be said to be a competitor of Shell, itself a doubtful proposition, the Council was not sued and its acts of disseminating the disputed report remain unchallenged.

It cannot be doubted that the public debate over the safety of plastic pipe, then being aired before a branch of state government, constituted a matter of great public interest and concern. There was an ongoing political controversy in California over the unrestricted use of plastic

pipe. The Commission was officially considering amendments to state law to permit the use of these pipes and had held a number of public hearings on the question. The Council and plaintiff as its attorney had been active participants at those hearings. Indeed, it was for the purpose of advocating his client's position before the Commission that plaintiff engaged CAL to analyze two pieces of polybutylene pipe. Those tests, as we have recounted, revealed the presence [sic] 50 to 500 ppm of the carcinogenic chemical DEHP. Plaintiff presented CAL's findings and report to the Commission and it then decided that polybutylene pipe should be reviewed under the California Environmental Quality Act. In response to this advocacy before the Commission, Shell sought to deflect this regulatory and scientific dispute from the public arena and recast it into a lawsuit in the federal court. Indeed, the very report Shell sought to suppress by injunctive means in its lawsuit was already part of the public record of the Commission and hence was available for inspection and duplication by any interested citizen. Shell's lawsuit was fatally defective because, under the First Amendment, one participant cannot silence the attorney of an opponent in a political controversy by invoking the equitable powers of the federal court. Indeed, Shell's own expert witness, Professor William Cohen of Standford University, conceded that there is no case that sanctioned the issuance of an injunction banning the discussion of matters of public concern over health and safety. This is no doubt because in a political controversy over issues of public interest, as Justice Holmes noted, "the ultimate good desired is better reached by free trade in ideas, – that the best test of truth

is the power of the thought to get itself accepted in the competition of the market, . . . That at any rate is the theory of our Constitution. . . . " (Abrams v. United States (1919) 250 U.S. 616, 630 [63 L.Ed. 1173, 1180] (dis. opn. of Holmes, J.).)[10]

We do not mean to suggest that injunctive relief is never available in cases of trade libel. Clearly, it is in the ordinary case involving private disputes. (See, e.g., System Operations v. Scientific Games Dev. Corp. (3d Cir. 1977) 555 F.2d 1131; Martin v. Reynolds Metals Co., supra, 224 F.Supp. 978.) But statements made in the context of a public debate before a governmental agency on a matter of public health simply cannot be enjoined no matter

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[10] It has been noted that the "marketplace of ideas" theory is not a shibboleth to all First Amendment questions. "This 'marketplace of ideas' argument for freedom of speech may at times serve liberty well, but it relies too dangerously on metaphor for a theory that purports to be more hardheaded than literary. How do we know that the analogy of the market is an apt one? Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate truth? And what of falsity: is not the right to differ about what *is* 'the truth' subtly endangered by a theory that perceives communication as no more than a system of transactions for vanquishing what is false? What, finally, of speech as an expression of self? As a cry of impulse no less than as a dispassionate contribution to intellectual dialogue?" (Tribe, American Constitutional Law (2d ed. 1988) Communication and Expression, § 12-1, p. 786, fns. omitted and emphasis in original.) Despite the limitations of the "marketplace of ideas" formulation as an all encompassing theory, it is nevertheless clear that under the free speech guaranty the validity and truth of declarations in political disputes over issues of public interest must be resolved by the public and not by a judge.

what tortious label is pasted upon them. As the Massachusetts high court noted in a comparable context more than 30 years ago, in a case seeking to enjoin the further publication of an allegedly false report unfavorable to plaintiff's special cancer treatment drug, "the great public interest . . . in the untrammelled discussion of cancer cures" constitutionally prohibited the issuance of an injunction. (Krebiozen Research Foundation v. Beacon Press, Inc. (1956) 334 Mass. 86, 98 [134 N.E.2d 1, 9].) Since an injunction against further dissemination of the report would constitute a prior restraint of publication, its issuance was barred by the First Amendment under the *Near* decision. (*Id.* at p. 96.) The same conclusion is compelled in this case for the same reasons. We conclude therefore that Shell had no probable cause to seek injunctive relief and the trial court correctly found that "[t]he law of the State of California and of the United States does not permit any court to issue an injunction to prevent the dissemination of such a report under the circumstances shown by the evidence in this case."

C. Probable Cause to Bring Action for Declaratory Relief

In its federal action Shell also sought a declaratory judgment that "polybutylene resin, and pipe manufactured therefrom, does not contain concentrations of DEHP at levels sufficient to represent a danger to human health, or at 50-500 parts per million, or at all." Plaintiff argues that Shell was inappropriately seeking to establish a scientific truth by the use of a declaratory judgment. We agree. Under the federal Declaratory Judgment Act, with exceptions not relevant here, the federal court, in a case

of actual controversy within its jurisdiction, "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (28 U.S.C. § 2201.) But Shell did not seek a declaration of legal rights; it sought instead a scientific declaration concerning its product. By this mechanism it endeavored to circumvent the very thing that the Commission, in its EIR review, sought to determine, namely whether the pipe or its connectors contained elements which rendered its use unsafe for domestic water use. Under the federal statute, it is settled that "declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body." (Dawson v. Department of Transp. (W.D.Okla. 1979) 480 F.Supp. 351, 352, citing, inter alia, public Service Commission of Utah v. Wycoff Company, Inc. (1952) 344 U.S. 237, 246 [97 L.Ed. 291].) In short, Shell did not seek a declaration of its "rights and other legal relations."

It follows from this that the cause of action for declaratory relief was also untenable and hence lacked probable cause. Given the constitutional constraints necessarily implicated by this political dispute, no reasonable attorney would have thought this action was tenable. Since the trial court properly found that Shell lacked probable cause to bring its lawsuit against plaintiff as a matter of law, we conclude that the instruction to the jury informing them of that determination, even if more detailed than necessary, created no reversible error.[11]

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[11] In light of this determination, we have no occasion to consider whether plaintiff's statements were privileged under Civil Code section 47.

III

EXPERT WITNESSES

In its next attack on the judgment, Shell argues that the trial court committed reversible error in admitting expert legal testimony on the question of probable cause. At trial plaintiff called three attorneys as expert witnesses.

Attorney Jermone B. Falk, Jr., who had represented plaintiff in the federal court action, testified among other things that an injunction against speech is almost never permitted in the United States, that plaintiff's actions in the matter were privileged, and that in his opinion there was no legal merit to Shell's action and he considered it frivolous. Two things struck Mr. Falk as extraordinary about the federal complaint: "The first is that the injunction sought was being sought against somebody's lawyer. I don't have any problem with suing lawyers, but to muzzle one I thought was unusual. [¶] And the second thing about it was that it was an injunction against someone speaking, and speaking in a political context." In Mr. Falk's view, political speech is at the heart of the First Amendment and its California counterpart. "That's the way we influence our institutions. And here was a proceeding that was already going on in the government before an administrative agency, [and] this was, this report was being used to persuade that agency of a position. [¶] And to enjoin it, to forbid its use either before that agency or in a related context really struck me [as being] at the heart [of] what the First Amendment is all about." Thus, "once something is a matter of public record, then people can talk about it, have a right to talk about it, comment on it, criticize it, support it, whatever."

In his view, it was also unusual to file a lawsuit for an injunction and then not seek a preliminary injunction.

After being retained by plaintiff, Mr. Falk sent a letter to Shell's counsel demanding an unconditional dismissal with prejudice and included citations of authority explaining why he thought dismissal was required by the law. In response, he received an inconclusive letter from opposing counsel who explained that he had "forwarded my letter to Shell Oil, but that it was a large organization and that it would take some time for them to do anything about it." After waiting some two months without a reply, Mr. Falk filed a motion to dismiss. In support of that motion, Mr. Falk filed a memorandum of points and authorities in which he made the same constitutional arguments as he did in his testimony. Shell responded by filing an opposition to the dismissal motion. Then three days before the scheduled hearing on the motion, Shell voluntarily dismissed the action against plaintiff.

Attorney William A. Wilson, who represented CAL in the federal action, testified that he believed the action "had absolutely no merit." "They were trying to enjoin something that was a matter of public record, trying to enjoin dissemination of information in an issue that was being hotly disputed in the public forum." His discussion with Shell's counsel led him to believe that what Shell really wanted "was a statement, they didn't want an injunction, they didn't want a declaratory relief, they didn't want damages. [¶] They wanted some kind of a statement. And at that point we started talking about what kind of a statement and then began working on the language of the statement, . . . " In short, Shell was "interested in some fashion of getting a statement to

neutralize the report." Although Mr. Wilson felt that Shell was applying "economic coercion" against his client, CAL and Shell eventually signed a joint settlement statement and the action was then dismissed with prejudice as to CAL.

Finally Attorney Irving H. Perluss, a retired judge whose only connection to the case was as plaintiff's expert, was allowed to testify at length about his views of the law and the merits of the case. He opined that an injunction involving speech can be issued in only the most dire necessity for national security and that product disparagement cannot be enjoined. Since Shell's federal court action did not concern national security, in Perluss's opinion there was no way the complaint could have been amended to state a cause of action. He also offered the opinion that plaintiff's status report was absolutely privileged. When reminded that injunctive relief is available against acts of unfair competition, he insisted that unfair competition laws pertain only to competitors and that there is no way plaintiff could be considered a competitor. He offered the opinion that it was "just outrageous" that plaintiff was sued, and that no reasonable person could say that there was probable cause to sue him.

Shell contends the expert testimony is not admissible on the question of probable cause. Shell is correct. Probable cause is a legal question for the court and it is thoroughly established that expert testimony is improper and incompetent on the issue of probable cause. (Williams v. Coombs, supra, 179 Cal.App.3d at p. 638.) In Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at pages 874-875, the California Supreme Court recently addressed and adhered to this rule in a malicious prosecution

action. "The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and past cases establish that the defendant's motivation is a question of fact to be determined by the jury. [¶] By contrast, the existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury." As the high court went on to explain, "[a]n important policy consideration underlies the common law rule allocating to the court the task of determining whether the prior action was brought with probable cause. The question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors, and courts have recognized that there is a significant danger that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim. To avoid improperly deterring individuals from resorting to the courts for the resolution of disputes, the common law affords litigants the assurance that tort liability will not be imposed for filing a lawsuit unless *a court* subsequently determines that the institution of the action was without probable cause." (*Id.* at p. 875, citations omitted and emphasis in original.)

In response to Shell's claim of error in the admission of expert testimony plaintiff inferentially concedes that expert testimony is not admissible on the question of probable cause. Instead, he argues that the testimony of Messrs. Falk and Wilson, as counsel for the parties defendant in the federal lawsuit, was offered for the limited

purpose of establishing a favorable termination and the relationship of the CAL settlement to the determination. We agree that the testimony of these attorneys was admissible on the question of favorable termination. "It is apparent 'favorable' termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits – reflecting on neither innocence of nor responsibility for the alleged misconduct – the termination is not favorable in the sense it would support a subsequent action for malicious prosecution." (Lackner v. LaCroix (1979) 25 Cal.3d 747, 751.) It has been correctly noted that a voluntary dismissal may have been prompted by factors other than the merits of the lawsuit. "Although voluntary dismissal of the underlying action is usually considered a favorable termination of the action for purposes of a malicious prosecution action, the failure to prosecute may occasionally be attributable to other than a complainant's implicit concession as to the merits of the action. Where the evidence conflicts as to the real motive for the voluntary dismissal of the underlying action, the question of favorable termination is to be resolved by the jury." (6 Cal.Jur.3d, Assault and Other Wilful Torts, § 345, pp. 878-879, fn. omitted; see Weaver v. Superior Court (1979) 95 Cal.App.3d 166, 184-185; Minasian v. Sapse (1978) 80 Cal.App.3d 823, 826-828; see also BAJI No. 7.32.5.) Such was the case here. Shell denied that its voluntary dismissal was prompted by its assessment of the merits of the federal action and consequently its

motive became a factual issue to be resolved by the jury. Thus the jury was instructed that favorable termination meant "that the termination was of such a nature as to indicate the freedom from liability of [plaintiff] in the prior federal civil proceeding. [¶] It is for you to decide, under all the circumstances of the evidence, whether dismissal of the prior federal suit by [Shell] against [plaintiff], reflected a lack of merit of said prior federal suit." Consequently, plaintiff was entitled to establish the circumstances surrounding the dismissal. Those circumstances included opposing counsel's assessment of the constitutional impediment to the federal lawsuit and his motion for dismissal based upon that assessment. The inference to be drawn from this testimony is that Shell's dismissal reflected a realization that its suit lacked merit and was untenable.

Shell asserts the testimony of Mr. Perluss poses a different problem. Shell says Mr. Perluss had no connection with the federal case and was not a percipient witness to any of the events that led to the dismissal of that action. He did, of course, read the pleadings and the motions of the parties in the federal suit. Nevertheless, the gist of his testimony related not to the favorable termination question but rather to the propriety of filing the lawsuit in the first place. Consequently, it is fair to say that he was called as an expert to testify on the law.

Plaintiff argues that Mr. Perluss's testimony was admissible on the reprehensibility of Shell's conduct in determining punitive damages. In his brief plaintiff argues that "[a] determination of lack of probable cause by the court does not tell a jury that the conduct is outrageous; it merely tells them that it is not permitted

under the law. There is a world of difference between conduct that falls below an objective standard and conduct that is so reprehensible to be beyond the pale of what any rational corporation with a huge legal staff could even imagine to be acceptable since the establishment of our Republic upon the North American continent 200 years ago." We need not resolve this contention because Shell waived any error in the admission of Mr. Perluss's testimony by failing to object to it. The Evidence Code provides that a verdict or judgment shall not be set aside by reason of the erroneous admission of evidence unless there "appears of record an objection to or motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; . . . " (Evid. Code, § 353, subd. (a); see also Evid. Code, § 803.) In light of this section, questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection. (People v. Rogers (1978) 21 Cal.3d 542, 547-548.) Thus, Shell waived any claim of error in the admission of expert testimony by Mr. Perluss by failing to object to his testimony. (Gaehwiler v. Occupational Safety & Health Appeals Bd. (1983) 141 Cal.App.3d 1041, 1046.)

Shell counters that it repeatedly objected to Mr. Falk's legal opinion testimony and that objection was persistently overruled. It argues that once a party's objections to a line of questioning have been asserted and overruled, it [sic] not necessary to continue to interrupt the taking of testimony in order to preserve appellate rights. (See 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 2022, p. 1984.) But that rule has no application here. The testimony of Mr. Falk was

offered for the limited purpose of establishing a favorable termination of the federal lawsuit and the jury was accordingly instructed on evidence admitted for a limited purpose. But the testimony of Mr. Perluss was not offered for a limited purpose or on the question of favorable termination. As Shell now characterizes it, that testimony was offered on the question of probable cause. The sweep of the continuing objection rule does not encompass the testimony of different witnesses offered for different purposes. (People v. Epps (1981) 122 Cal.App.3d 691, 704.) By failing to object, Shell waived any error.

IV

EVIDENCE OF TOXICITY

Shell next contends that the trial court committed reversible error in admitting evidence of the toxicity of Celcon fittings. Over its objection, plaintiff introduced evidence concerning the leaching of trioxane at hazardous levels from Celcon fittings. Shell contends that it did not know about trioxane leaching problems when it filed the federal suit against plaintiff and consequently the evidence was both irrelevant and prejudicial. Plaintiff counters that this evidence was admissible to show a course of conduct on the part of Shell in withholding toxic information from public officials in order to obtain approval of its polybutylene pipe system and that the lawsuit against him was part of this pattern of suppression.

Celcon fittings are made by the Celanese Corporation from a polyacetal. The particular chemical at issue here is trioxane. This is a hydrated form of aldehyde. This is

included in a chemical family that also includes formaldehyde. As long as trioxane remains in its "tri" form, it is a relatively nontoxic chemical. However, if anything causes it to breakdown into formaldehyde then it could raise a much graver concern related to health issues.

Before polybutylene pipes were proposed for potable water systems they were mainly used for venting and discharge piping. At that time polybutylene pipes were joined by a heat fusion system or with metal fittings. Polybutylene can be used for fittings to be used in a heat fusion system, but due to its flexibility cannot be used to produce insert fittings. In the early 1970's Celanese Corporation developed Celcon polyacetal fittings for use with polybutylene pipe. By 1979 and 1980, Celcon fittings were becoming an important or substantial system for the installation of polybutylene pipe. Dr. Lappe testified that during the Commission hearings he did not raise an issue with respect to trioxane because "I was unaware or ignorant or whatever. I was never told and never had material, I was never given a fitting. I was never given an assembly like that." He said that he was only told that polybutylene systems were all polybutylene and metal pressure fittings. He opined that if he had been aware that fittings used with polybutylene pipe used trioxane he would have raised an issue with respect to it.

Following the decision to subject polybutylene pipe to the EIR process there were discussions concerning the appropriate manner of testing the pipe. In the summer of 1982 (well after Shell had dismissed its federal court action against plaintiff), Shell's liaison to the state on health and safety questions, Robert Mitchell, realized that the EIR protocol would test an entire water system rather

than just polybutylene pipe. He recommended that Shell conduct some testing on a full water system, including Celcon fittings. Shell conducted what was referred to as a "torture test" on Celcon fittings in October 1982. The test revealed the presence of trioxane in the water leachate. As a result Mitchell was asked to look into Celcon fittings.

In response to Mitchell's inquiry Celanese Corporation provided information concerning regulatory approval of Celcon fittings. For one thing, in a published federal regulation which specifically stated that Celcon is a reaction product of formaldehyde and ethylene oxide, Celcon had been approved by the Food and Drug Administration for food contact use. And the National Sanitation Foundation had approved Celcon for use in contact with drinking water. Shell then inquired whether Celanese had actual toxicity data that could substantiate the safe use of trioxane. Celanese responded that it had a number of studies showing that Celcon could be used safely.

Shell requested the studies from Celanese. Celanese replied that it desired to maintain the studies as confidential documents and would release them to Shell only for internal review. Eventually Shell signed an agreement with Celanese providing that the studies would be circulated within Shell to only those people who needed to see them, the documents would not be released publicly without permission from Celanese, and any questions arising concerning trioxane would be referred to Celanese to answer. Shell added to the agreement a provision that in the event the Commission had questions about trioxane and Celanese failed to respond, then Shell would

be forced to provide the Commission with all information in its possession.

In January 1983, Shell received the Celanese studies. They were reviewed by toxicologists in Shell's health, safety and environment department. That department reported that the studies supported the safe use of Celcon fittings and that there was nothing which would trigger a concern from a health standpoint. Shell did not turn over these reports to Commission.

On appeal plaintiff contends, as he did below, that Shell maliciously filed the federal lawsuit as "a smoke screen to distract public officials, destroy [plaintiff's] credibility, scare Cal Labs out of testing and intimidate any others who might question any part of a polybutylene system." In support of that theory, plaintiff was entitled to adduce evidence tending to show what he perceived to be the true reasons why Shell filed its lawsuit against him. It was for the jury, as the trier of fact, to resolve the truth of that theory. As the trial court correctly admonished defense counsel, "you can't limit [the malicious prosecution action] to the chemical aspect of the case, counsel. There is a lot of things that this case is about. [¶] It's with malice. It's about a course of conduct, it's about chemicals, it's about a lot of kinds of chemicals. It's about withholding information. It's about many of the things that we've heard so far and many of the things to which [plaintiff's counsel] has alluded. [¶] You can't limit the issue here whether or not this . . . did or didn't have D.E.H.P. in it." Plaintiff established that Shell had represented to the State in 1979 that its pipe system, including the fittings, was entirely made of polybutylene. Plaintiff

was entitled to show that this representation was inaccurate and the federal lawsuit was an effort to suppress this potentially adverse information.

Shell asserts that even if relevant, the evidence of the toxicity of Celcon fittings was prejudicial and confusing and thus should have been excluded under Evidence Code section 352. As Shell sees it, this evidence distracted the jury from Shell's reasons for filing the federal action and instead centered attention on its activities after the suit had been dismissed. The assertion is belied by the record. The whole point in adducing this evidence was to show one of the real reasons why Shell instituted the federal lawsuit. We find no error in the admission of the evidence concerning the Celcon fittings.

V

DAMAGES

A. Compensatory Damages

We turn now to the damage issues and begin with the compensatory award. As we have recounted, the jury awarded plaintiff $197,000 in compensatory damages, of which $22,000 appears to be for attorney's fees incurred in defending against the federal lawsuit. In light of the fact that there was no evidence that plaintiff incurred any medical expenses or suffered any wage or business losses, Shell argues that the award was grossly excessive and not supported by the evidence. We disagree.

The victim of a malicious prosecution action is entitled "to recover the cost of defending the prior action including reasonable attorney's fees, compensation for injury to his reputation or impairment of his social and

business standing in the community, and for mental or emotional distress." (Bertero v. National General Corp., supra, 13 Cal.3d at p. 51, citations omitted.) The harm suffered by plaintiff in this case, as in *Bertero*, "was solely to intangible interests – his reputation and emotional well-being. The fixing of such damages has long been vested in the sound discretion of the trier of fact subject only to the session and prejudice standard." (*Id.* at p. 64, citations omitted.) This standard has been adopted out of practical necessity. "Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved are not capable of exact proof in terms of dollars and cents, and the only standard is such an amount as a reasonable person would estimate as fair compensation. Hence, necessarily, the determination of the amount of damages is, in the first instance, left to the exercise of a sound discretion by the jury, and a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment." (Roedder v. Lindsley (1946) 28 Cal.2d 820, 822-823; accord Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 419.)

In making our assessment, we are mindful that "mental suffering frequently constitutes the principal element of tort damages" and that "courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for

physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, . . . " (Capelouto v. Kaiser Foundation Hospital (1972) 7 Cal.3d 889, 892-893, citations and fn. omitted.) In the words of the Restatement Second Torts, "[i]t is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered." (Rest.2d Torts, § 912, com. a, p. 479, quoted with approval in Clemente v. State of California (1985) 40 Cal.3d 202, 219.)

Plaintiff perceived the suit against him as an assault upon his most precious attribute, his integrity. The impact of that suit upon his emotional well being was described by several witnesses. His attorney, Jerome Falk, depicted plaintiff as being considerably upset by the suit. "He was being accused in the lawsuit of repeating something that was untrue and that he knew to be untrue, made it clear to me that he found that upsetting. [¶] And I observed that he was distracted and as well he might have been by the fact that he was now having to deal with being a defendant in a lawsuit." Moreover, plaintiff correctly perceived that the lawsuit besmirched his integrity. And a lawyer's integrity for truthfulness is "an essential ingredient for being able to practice our profession, . . . [¶]

And this [lawsuit], of course, he regarded as an attack on that, which it was." Leo Paul Rock, a Catholic priest and clinical psychologist, vividly described the intensity of the pain and emotional distress suffered by plaintiff. Father Rock depicted plaintiff as being "a very warm and caring person, has always been very idealistic, and I think for that reason very vulnerable to being hurt. [¶] I would say one of his outstanding characteristics has been his honesty or his integrity, that he prizes that, I guess, more highly than anything else, . . . [¶] I think his attraction to the law in the first place was seeing it as a way of doing something for the public good. That was always a strong motivation." Plaintiff was stunned by the lawsuit. "He just couldn't believe this was happening. He wanted to – he just wanted to run away from the whole thing and forget it, forget the whole thing. [¶] And then the next – after that, there was rage. He was just so angry at being called a liar, in effect, as he felt he was; very, very angry at all of this and didn't know what he was going to do about it, terribly upset, extremely distressed, not sleeping at night, just preoccupied. [¶] It was hard for him to think about anything else during this time. It just sort of took over his whole life, awareness, his preoccupation."

In addition to experiencing these symptoms of stress, the lawsuit caused plaintiff to become disillusioned by the practice of law. "I think his approach changed dramatically. He made the decision that he would minimally practice law as a way of earning the income to support his family. [¶] But he would give more and more time to public service as a way of balancing out, I think, being part of sometime that he sort of lost faith with. . . . [¶] So he spent more and more time in hospice work, helping

the dying, the families of the dying." This lawsuit, implicitly accusing plaintiff of lying, struck at his very soul. "If you wanted to pick the one thing that would hurt him the most, it would be to call him a liar, to impugn his integrity." Dr. Lappe described plaintiff's reaction to the lawsuit this way: "He was very distraught and, frankly, seemed to be near to breaking up. I've never had a conversation with him where he had this degree of distress."

But the most poignant account of the devastating impact of the lawsuit came from plaintiff himself. It was "like getting hit in the face with a two by four. You are numb for – I was numb for about an hour. . . . [¶] And then the feelings after that were, I really started to examine my conscience as to what 1 had done wrong. And 1 just – I went back through it all and tried to determine as I read the complaint what it was that I had done wrong." The impact quickly radiated to his children. They "had heard from their classmates something was going on with me. My nine-year-old asked me if I was going to go to jail because I was a liar." Plaintiff suffered "many, many sleepless nights. [¶] I would take work home with me. And when I couldn't sleep, I would go back through the files, and I would go back through the research and go back through the Shell stuff and try and understand it better." Although his family was supportive, the whole ordeal placed a heavy and painful "strain on my family system." The lawsuit also impinged upon his professional life. "I had to focus every ounce of my energy and attention and concentration into this particular issue." As a result, "I was spending all of my time on this case professionally."

But more than that, the lawsuit engendered intense feelings of rage and anger. "Anger, we experience anger, but I, in my lifetime, haven't experienced rage as intensely, maybe one or two times, as I have in this matter. It's sort of like it's beyond anger. [¶] It's a rage that has to do with justice."

If Shell's purpose had been to intimidate plaintiff, it succeeded. As a result of the suit, plaintiff changed the way he practiced law and lived his life. He decided that he "needed more direct involvement with people outside of an area of controversy and legal fighting." As he phrased it, "I had to start living my professional life in such a way that I could get away from the controversial nature of these kinds of chemical controversies and debates." So plaintiff began to "spend about half to two-thirds of my time practicing law. And the other part of my time I spend volunteering at Mercy Hospital and volunteering for the Roman Catholic Bishop in Sacramento." Asked if the experience that he underwent as a result of Shell's lawsuit affected the way he lived and practiced law, plaintiff summed up his litigious nightmare this way: "It's like being in the ring with your hands tied behind your back, you know, you can get beat up only so long before you don't want to get in the ring any more."

We conclude that this evidence amply supports the compensatory award for emotional distress and injury to reputation. Given this record, we cannot say the jury's decision was based upon prejudice and passion.

B. Punitive Damages

Shell next contends that the $5 million punitive damages awarded in this case was excessive as a matter of law. It argues that amount is unreasonably large when compared with the actual damages suffered, is excessive in light of the degree of reprehensibility of Shell's conduct, and resulted from passion and prejudice. Shell further argues that the court erroneously excluded evidence that for the most part the company lost money in its polybutylene division we find the contentions unpersuasive.

In a tort case such as this, when the "defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) "The purpose of punitive damages," the high court has noted, "is to punish wrongdoers and thereby deter the commission of wrongful acts." (Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 928, fn. 13.) Thus punitive damages "are neither equitable nor corrective; punitive damages serve but one purpose – to punish and through punishment, to deter." (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387.)

" 'How much' in punitive damages is enough to accomplish this purpose in a particular case," the high court has cautioned, "is not susceptible of mathematical definition." (Wyatt v. Union Mortgage Co. (1979) 24 Cal.3d 773, 790.) Nevertheless, in making an assessment to determine whether an award of punitive damages is

excessive, "we are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Id.* at p. 928, fn. and citations omitted.) In making our assessment under these standards, we examine the evidence on this issue in the light most favorable to the judgment. (Moore v. American United Life Ins. Co. (1984) 150 Cal.App.3d 610, 636.) Having made that assessment, we "may reverse an award of punitive damages only when the entire record, when viewed most favorably to the judgment, indicates that the judgment was rendered as a result of passion and prejudice." (Nevada National Leasing Co. v. Hereford (1984) 36 Cal.3d 146, 153.)

1. Reprehensibility of Shell's Conduct

Viewing the evidence most favorably to the judgment, the jury determined that Shell was guilty of maliciously bringing a lawsuit against plaintiff to silence and muzzle him. As found by the jury, Shell engaged in a continuous course of conduct to thwart the open governmental process of resolving conflicting claims on a subject of marked public interest. Seen in this light, Shell's conduct threatened the indispensable rights of all citizens to appear before their government and to speak out in matters of public health and safety without fear of legal retaliation. As the jury inferentially found, the pattern of reprehensible conduct also involved the continuous misrepresentation of the nature and safety of the polybutylene pipe system. This pattern, the jury could reasonably have concluded, included the continuous threats of litigation against anyone who dared make any adverse comment about the polybutylene pipe system as well. The use of a superior fiscal position to silence opposing voices in public debate by the misuse of the legal process strikes at the very heart of the democratic process. Given this record, the jury could reasonably find that Shell's conduct was extremely reprehensible. As we have noted, Shell's management, the "boys in Houston", perceiving that the company was being hurt economically, decided to play "hardball" in their effort "to dampen or quiet these kinds of outspoken statements." The game Shell elected to play was a legal game and the object of its suit the suppression of speech. The penalty for fouling in this game is punitive damages.

2. The Relationship to Compensatory Damages

The punitive damage award was approximately 25 times the compensatory damages awarded to plaintiff. Shell argues that the award of punitive damages is unreasonably large when compared with the actual damages suffered. As we noted in Moore v. American United Life Ins. Co., supra, 150 Cal.App.3d at page 636, such a ratio is not unheard of. There the ratio between punitive and compensatory damages was 83:1. Noting that ratios of 78:1 (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d 910) and 200:1 (Wetherbee v. United Ins. Co. of America (1971) 18 Cal.App.3 266) had been upheld, we concluded that the ratio in that case did not justify reversal. (See also [Hobbs v. Bateman Eichler, Hill Richards, Inc. (1985) 164 Cal.App.3d 174, 196 (2.3:1 ratio)]; Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal.App.3d 381, 384 [26:1]; Chodos v. Insurance Co. of North America (1981) 126 Cal.App.3d 86 [40:1].)

Although acknowledging that California appellate courts have sustained verdicts with ratios greater than 25:1, Shell contends that punitive damages must nonetheless bear a reasonable relationship to compensatory damages. (See Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal.App.3d 451, 469.) But as we explained in *Moore*, if the overriding consideration were whether there is a reasonable relationship between the two awards then the result may be to thwart the purpose of punitive damages. " 'One example of this is the situation where a plaintiff has suffered only minor injury or is only able to prove a small amount of actual damages, yet the conduct of the defendant has been especially wanton or malicious. . . . This example illustrates the fact that in its operation the

reasonable relation rule can ignore the punitive and deterrent functions of exemplary damages.' " (Moore v. American United Life Ins. Co., supra, 150 Cal.App.3d at pp. 636-637, quoting Comment, Punitive Damages and the Reasonable Relation Rule: *Study in Frustration of Purpose* (1978) 9 Pacific L.J. 823, 839-840, fn. omitted; accord Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal.App.3d 1072, 1098.) Such is the case here. One would ordinarily expect only a relatively small amount of actual damages to be sustained by a person subjected to a maliciously filed lawsuit, the central purpose of which is to suppress illegitimately the exercise of free speech. In light of this fact and the not unique ratio, we conclude that the challenged ratio does not constitute grounds for reversal.

3. Shell's Net Worth

As we have noted, all other things being equal, the greater the wealth of the defendant, the larger an award of exemplary damages because a proportionally higher amount is needed to accomplish the objective of punishment and deterrence. At the time in question Shell amassed annual profits of $1.7 billion and had a net worth of over $12.5 billion. Thus the punitive damages, award represents only approximately one twenty-fifth of one percent of Shell's net worth. As plaintiff correctly notes, punitive damages in the sum as high as 33 percent of net assets have been judicially approved as a measure of punitive damages. (See Zhadan v. Downtown L. A. Motors (1976) 66 Cal.App.3d 481, 499-500.) Given this of [sic] line of cases, Shell understandably does not argue that the punitive award is disproportionate to its net

worth and income. Instead, it argues that the trial court erroneously excluded evidence of the profits of Shell's polybutylene division. Quoting a treatise on damages, Shell contends that where the defendant is a large, multinational, multibillion dollar corporation "the punitive damages should bear some reasonable relationship to the employee's tortious act and perhaps the corporation's earnings in the community in which it does business and in which plaintiff was injured, unless of course the corporation is embarked on some national or world-wide malicious and tortious venture." (Johns, Cal. Damages: Law and Proof (3d ed. 1985) § 18.4, p. 18-15.) Whatever the validity of this argument, it is unrelated to the claim of error here. Shell did not assert that the damages should be measured by its earnings in California. Rather it sought to establish that the polybutylene division had not been particularly profitable. Even so, the offending defendant cannot parse off the profitable parts of its business in order to minimize its exposure to punitive damages. The purpose of punitive damages is to punish the offender, not to measure the commercial success of its individual products. The trial court did not err in rejecting the proffered evidence.

Finding no err [sic] in the determination or calculation of the punitive damages, we uphold them.

DISPOSITION

The judgment is affirmed.

SPARKS, J.

We concur:

BLEASE, Acting P.J.

SIMS, J.

APPENDIX B

IN THE
COURT OF APPEALS OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

(Filed Jan. 5, 1990)

RAYMOND J. LEONARDINI

Plaintiff and Respondent

vs.

SHELL OIL COMPANY,
A DELAWARE, ETC.

Defendant and Appellant

3 Civil C000619
Sacramento
310945

By the Court:

Appellant's petition for rehearing is denied.

Dated: January 5, 1990

SPARKS, Acting P.J.

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cc: See Mailing List

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Third Appellate District No. C000619
S013817
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

RAYMOND J. LEONARDINI, Respondent

v.

SHELL OIL COMPANY, Appellant

(Filed Mar. 29 1990)

Appellant's petition for review DENIED.

Lucas, C.J., Panelli, J. and Eagleson, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX D

SEDGWICK, DETERT, MORAN & ARNOLD
STEPHEN W. JONES
BERRIDGE R. MARSH
One Embarcadero Center, 16th Floor
San Francisco, California 94111-3765
Telephone: (415) 781-7900

Attorneys for Defendant
SHELL OIL COMPNAY

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

RAYMOND J. LEONARDINI, Plaintiff, v. SHELL OIL COMPANY, a Delaware corporation, and DOES 1 to 100, Defendants.	No. 310945 ORDER STAYING ENFORCEMENT OF JUDGMENT ENDORSED APR 17 1990

The application of defendant Shell Oil Company for stay of enforcement of judgment was presented to the Court on April 17, 1990. Both plaintiff Raymond Leonardini and defendant Shell Oil Company appeared by counsel.

The Court, having read and considered the application, the supporting and opposing memoranda and declarations, having heard the arguments of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED that execution on the judgment entered April 22, 1986 and all proceedings for the

enforcement of said judgment be stayed pending final action by the Supreme Court of the United States on any petition for writ of certiorari or appeal filed with that Court by Shell Oil Company. If Shell Oil Company does not seek review by the U.S. Supreme Court within the time when such review may be timely sought, then this stay shall be dissolved.

April 17, 1990

RONALD R. ROBIE
Judge of the Superior Court

Undertaking – $9,000,000

APPENDIX E

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX F

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

§ 3294 California Civil Code

(a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

* * *

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.

(2) "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

APPENDIX H

HARRY E. HULL, JR., ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

(Filed Aug 7, 1981)

SHELL OIL COMPANY, a Delaware corporation, Plaintiff, v. CALIFORNIA ANALYTICAL LABORATORIES, INC., a California corporation; RAYMOND J. LEONARDINI, an individual, Defendants.	No. COMPLAINT TO ENJOIN TRADE LIBEL, AND FOR DECLARATORY RELIEF

COMES NOW plaintiff, Shell Oil Company, a Delaware corporation (hereafter "Shell"), by and through their undersigned attorneys, and for its claims alleges:

JURISDICTION AND PARTIES

1. Shell brings this action pursuant to the jurisdictional authority of Title 28 U.S.C. Section 1332, there being diversity of citizenship between the parties as hereinafter set forth. The value of the matters in controversy

exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

2. Shell is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the State of Texas.

3. Shell is informed and believes, and thereon alleges, that defendant California Analytical Laboratories, Inc. (hereafter "CAL") is a corporation organized and existing under the laws of the State of California, with its principal place of business in the County of Sacramento, State of California.

4. Shell is informed and believes, and thereon alleges that defendant Raymond J. Leonardini (hereafter "Leonardini") is, and at all times mentioned herein was, an individual residing in the County of Sacramento, State of California.

ALLEGATIONS APPLICABLE TO ALL CLAIMS

5. Shell, through its operating division known as Shell Chemical Company, at all times mentioned herein, has been and is the sole manufacturer of a compounded polybutylene resin which Shell sells to pipe and fitting manufacturers who, in turn, process the resin into finished pipe.

6. Prior to 1980, the California Department of Housing and Community Development commenced proceedings to consider the adoption of regulations approving the use of plastic pipe, including polybutylene pipe, as a conduit for potable water in residential and commercial buildings. The California Commission of Housing and

Community Development approved the use of polybutylene pipe for that purpose in November, 1980.

7. Shell is informed and believes, and thereon alleges, that in December, 1980, within the Eastern District of California, defendant CAL conducted, and reported to others the results of, certain tests of polybutylene pipe processed from Shell's polybutylene resin. CAL concluded from its tests and reported that the polybutylene pipe tested contained 50-500 parts per million of a chemical substance referred to in its report as bis (2-diethylhexyl) phathalate (sic) (BEHP). A true and correct copy of CAL's report is attached hereto as Exhibit A and incorporated by reference herein. Said substance is also referred to as and is the same chemical substance as diethylhexyl phthalate, abbreviated "DEHP."

8. The chemical DEHP, prior to defendant CAL's tests, had been found to cause cancer in laboratory animals, and a concentration of DEHP at the levels allegedly found by CAL could represent a danger to human health according to some studies.

9. On or about December 31, 1980, defendant CAL willfully and intentionally, without justification or privilege, and in reckless disregard of the truth, published, communicated and caused to be published and communicated to defendant Leonardini and to others the report or the findings of the report referred to in paragraph 7 above.

10. Thereafter, from on or about January, 1981 to the present, Leonardini willfully and intentionally, without justification or privilege, and in reckless disregard of the

truth, published, communicated and caused to be published and communicated the CAL report referred to in paragraph 7 above or the material findings thereof.

11. The CAL report referred to in paragraph 7 above and attached hereto as Exhibit A refers to polybutylene pipe processed from Shell's polybutylene resin and it was so understood by those who read it.

12. CAL's report is false. In fact, neither the polybutylene resin manufactured by Shell nor the polybutylene pipe tested by CAL contained, at the time of the test or at any other time, DEHP.

13. During the spring of 1981, CAL and Leonardini were informed that laboratory reports by independent chemical analytical laboratories had concluded that DEHP was not present in polybutylene pipe and was found, if at all, only in the pipe leachate at levels normally associated with laboratory background environments and at levels not dangerous to human health.

14. Further, during March, 1981, CAL was requested by Shell to retest polybutylene pipe and was offered and received three samples of polybutylene pipe marketed in California. CAL failed to conduct further tests of the pipe received or failed to report the results of any other tests conducted.

15. Notwithstanding CAL's and Leonardini's receipt of the information referred to in paragraph 13 above, CAL continues to refuse to retest, reconsider, qualify or retract its conclusions regarding the presence of DEHP in polybutylene pipe. Shell has twice requested a retraction of CAL's conclusions.

16. CAL and Leonardini knew or reasonably should have known that third persons to whom the conclusions of the CAL report have been published or communicated would rely upon it.

17. CAL and Leonardini, by their above-described actions, have disparaged and continue to disparage Shell's product by disseminating and publishing the erroneous report that the polybutylene pipe processed from Shell's resin and tested by CAL contains DEHP.

18. As a proximate result of CAL's publication of its report and its later refusal to reconsider it, prospective customers in the United States and elsewhere have been and will be deterred from buying polybutylene pipe and resin.

FIRST CLAIM

(Injunctive Relief)

19. Shell repleads each and all of the allegations set forth in paragraphs 1 through 18 hereinabove, and incorporates said allegations into this First Claim as though the same were fully set forth herein.

20. Unless restrained and enjoined by this Court, defendants and each of them will continue to publish and communicate CAL's erroneous conclusions set forth in its report to the irreparable damage and injury to Shell's business in that prospective purchasers of polybutylene pipe and resin will be persuaded not to purchase said pipe and resin.

21. Shell has no adequate remedy at law, in that it will be impossible for Shell to determine the precise

amount of damage it will suffer if defendants and each of them are not restrained and enjoined as requested herein.

WHEREFORE, Shell prays for relief as hereinafter set forth.

SECOND CLAIM

(Declaratory Relief)

22. Shell repleads each and all of the allegations set forth in paragraphs 1 through 18 hereinabove, and incorporates said allegations into this Second Claim as though the same were fully set forth herein.

23. A present, existing and actual controversy exists between Shell and the defendants and each of them herein, in that Shell contends that its polybutylene resin, and pipe properly manufactured therefrom, does not contain concentrations of DEHP at levels sufficient to represent a danger to human health, or at 50-500 parts per million, or at all, and defendants and each of them contend to the contrary.

24. Shell, pursuant to the Federal Declaratory Judgment Act, Title 28 U.S.C. Sections 2201-2202, seeks a declaratory judgment establishing its contentions as hereinabove set forth.

WHEREFORE, Shell prays for relief against defendants herein as follows:

1. On Shell's First Claim:

a. For a temporary restraining order and a preliminary injunction, temporarily restraining and preliminarily enjoining defendants, their

agents, servants and employees, and all persons acting under or in concert with them, from further publishing and communicating CAL's test results and conclusions regarding the presence of DEHP in polybutylene pipe, pending a hearing on Shell's request for a permanent injunction against such conduct by defendants:

b. For a permanent injunction enjoining defendants, their agents, servants and employees, and all persons acting under or in concert with them, from further publishing and communicating CAL's test results and conclusions regarding the presence of DEHP in polybutylene pipe;

2. On Shell's Second Claim, for a declaratory judgment declaring that Shell's polybutylene resin, and pipe manufactured therefrom, does not contain concentrations of DEHP at levels sufficient to represent a danger to human health, or at 50-500 parts per million, or at all;

4. On each and all of Shell's claims, for Shell's costs of suit herein, and for such other and further relief as may appear proper.

DATED: August 7, 1981.

McDONOUGH, HOLLAND & ALLEN
A Professional Corporation

/s/ Harry E. Hull
By /s/ Illegible
HARRY E. HULL, JR.

Attorneys for Plaintiff

EXHIBIT A

California Analytical Laboratories, Inc.

401 NORTH 18th STREET
SACRAMENTO CALIFORNIA 95814
(916) 444-9602

December 31, 1980
Lab No. 12343
Received: 11/17/80

Mr. Raymond Leonardini
Attorney at Law
717 "K" St., Suite 510
Sacramento, CA 95814

Two lengths of polybutylene pipe for analysis.

Sample I.D.

1. Westpro Bluetube B1-37-7 AWWA C902 BJO 52 1" CTS PB 2110 SDR 13.5 160 PSI @ 73°F D2666
2. 1" CTS PB 2110 SDR 13.5 160 PSI D2666 Westpro Colflare

The pipe samples were prepared for analysis as follows: Each piece was cleaned with a mild detergent solution to remove grease, oil or tape from the outside surface, rinsed with copious amounts of tap water and allowed to dry.

Subsamples were obtained by boring a series of 3/8-inch cores from each piece at least six inches in from the end. The turnings were collected on a piece of hexane rinsed

aluminum foil. The drill bit was rinsed with acetone and hexane and dried between samples. The drill was run at low speed so that very thin turnings were obtained.

Standard CAL 40 mL vials which had been rinsed with methanol, baked at 110° overnight and capped with a teflon-lined septum were charged with about 1 gram (weighed exactly) of sample; three such vials were obtained per composite. Two of these were held for VOA GC/MS analysis. To the third was added 10 mL of hexane (Baker Resianalyzed Grade); these were shaken and held under ambient conditions overnight for Base/Neutral GC/MS analysis.

Volatile organic compounds were determined by placing five mL portions of "clean" water (spiked with 100 ng of a deuterated standard) in the vials containing plastic pipe shavings. The vials were allowed to stand for 48 hours prior to analysis. At the time of analysis, the vials were purged for 15 minutes with 40 mL per minute of helium and trapped on a Tenax-silica gel trap. During the purge, the vial was immersed in an 80°C water bath. The trapped organics were desorbed into the GC/MS system and analyzed. Results are prefixed by a V in Table I.

Semi-volatile organic compounds were determined by injection of an aliquot of the hexane extract of the shavings; this constituted the Base/Neutral fraction

(prefixed by B in Table 1).

Levels of identified compounds were estimated by comparison to the known levels of deuterated internal standards added before analysis. The reported levels are to be considered as rough estimates only.

Results are presented in Table I.

All raw GC/MS data will be retained at CAL for your future use.

/s/ Charles J. Soderquist
Charles J. Soderquist, PhD
Vice President
Agricultural and Environmental Chemistry
/s/ Paul A. Taylor, PhD
Paul A. Taylor, PhD
President
/s/ S. T. Miille, PhD
GC/MS Services

TABLE I

Compound	GC/MS reference scan no.[a]	Estimated level, ppm (mg/ks)
butene	V72	0.1-1.0
acetone	V92	0.5-5.0
diethyl ether	V160	0.01-0.1
methyl cyclopentane	V226	0.1-1.0
methyl cyclohexane	V324	1-10
3-methyl hexane	V373	1-10
3-ethyl-3-methyl pentane	V386	1-10
heptane	V437	1-10
5 alkanes ($>C_{16}$)	B407,B421,B479 B496, B647	100-1000 total
butylated hydroxy toluene (BHT)	B533	50-500
bis (2-ethylhexyl)phathalate (BEHP)	B633	50-500
a C_{18}-C_{19} alkene	B681	5000-50,000
acetone	V93	0.5-5.0
diethyl ether	V161	0.05-0.5
methyl cyclohexane	V325	0.5-5.0
2,3,3-trimethyl hexane	V388	0.5-5.0
10 alkanes ($>C_{16}$)	B388, B407, B420, B478, B488, B507, B540, B549, B596, B646	100-1,000 total

NOTES: [a] V = Volatile Organic fraction, B = Base/Neutral (hexane-extracted) fraction.

No. 89-2029

In The

Supreme Court of the United States

October Term, 1989

SHELL OIL COMPANY,

Petitioner,

vs.

RAYMOND J. LEONARDINI,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

JOHN M. POSWALL*
GEORGANN B. JOHNSTON
FRIEDMAN, COLLARD & POSWALL
7750 College Town Drive, #300
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Attorneys for Respondent Raymond J. Leonardini

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Are the safeguards and standards of California punitive damage law constitutional when applied to the *intentional* tort of malicious prosecution where a unanimous jury and a unanimous appellate court found Shell Oil intentionally and maliciously abused the court system as part of a concerted effort to silence opponents' speech on fundamental public policy issues of health and safety then being debated before California governmental bodies and in the public forum?

2. Is a punitive damage award equal to two hours of defendant's sales constitutionally "grossly excessive" when viewed against the reprehensibility of Shell's conduct which the California appellate court found "strikes at the very heart of the democratic process?"

3. Can Shell Oil raise, for the first time before this Court, the issue of "burden of proof" when it offered the very same instruction given to the jury on burden of proof?

PARTIES

The only respondent party to this action is Raymond J. Leonardini. While an attorney representing a client in the underlying action, he was sued individually by the Shell Oil Company and, in turn, brought this action for malicious prosecution individually against the Shell Oil Company.

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No. 89-2029

In The

Supreme Court of the United States

October Term, 1989

SHELL OIL COMPANY,

Petitioner,

vs.

RAYMOND J. LEONARDINI,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

Raymond J. Leonardini files this opposition to the Shell Oil Company ("Shell") petition for writ of certiorari to review the decision of the Court of Appeal of the State of California, Third Appellate District ("Opinion").*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are reprinted in the Appendix as Items A, B, C and D.

* Page references to the "Opinion" are as numbered in the Appendix to the Petition for cert; "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript.

STATEMENT OF THE CASE

INTRODUCTION

Shell filed what has become known in law and politics as a SLAPP suit.[1] It did so as part of its strategy to

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[1] According to the authors of a National Science Foundation study:

> Every year hundreds, perhaps thousands of civil lawsuits are filed in the United States whose sole purpose is to prevent citizens from exercising their political rights or to punish those who have done so . . . .
>
> We call these cases 'Strategic Lawsuits Against Public Participation' or SLAPPS, attempts to use civil tort actions to stifle political expression . . . .
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> * * *
>
> They need not go to trial to be 'successful.' Their intimidation or chilling effect occurs upon filing, or even the threat of filing . . . .
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> * * *
>
> The most common setting that led to a SLAPP in our sample was also the simplest. One party approaches some governmental body or office about a matter affecting some other party. The other party then filed a lawsuit against the first party. This pattern occurred in 71 percent of our cases.
>
> * * *
>
> Even though SLAPPS may be cases of muscle flexing to regain private economic advantage, the fact that political repression is their manifestation and the courts are their vehicle threatens to undermine confidence in democratic principles. That political repression can masquerade as torts, can involve the judiciary in its operation, and yet be difficult to identify makes it all the more pernicious.

Canan and Pring, *Strategic Lawsuits Against Public Participation* (University of Denver College of Law, Political Litigation Project 1988); *See*, Pring and Canan *Litigation to "Chill" Public Interest Advocacy* (University of Denver College of Law, Intimidation Lawsuit Project 1986).

discourage or punish political participation by those who would question the public health and safety, before governmental bodies and in public forums, of Shell's campaign to obtain governmental approval for the use of plastic pipe to carry drinking water into the homes of 20 million Californians.

Ironically, before this Court, Shell claims a first amendment right to silence, by injunctive prior restraint, one's too effective political opponents in a public debate.[2] Such suppression of political speech has never been sanctioned by this Court in the 200-year history of the Republic and should not be encouraged by the granting of certiorari here.

– THE FACTS – WHAT SHELL DID –

In the midst of a national debate, centered before public bodies in California, concerning the public health and safety of unrestricted use of plastic pipe to transport drinking water in homes, Shell sued to silence its most effective political opponent and his scientific advisors. It did so as part of a deliberate and concerted plan of intimidation, deceit and misrepresentation, and to thwart discovery of serious health risks known to it – but hidden from the State of California – to exist in the advocated plastic pipe system.

To quote the *unanimous* Opinion of the court of appeal, upholding a *unanimous* jury verdict:

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[2] "The freedom of expression protected by the first amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively." *United States v. Eichman, et al.*, ___ U.S. ___; 58 L.W. 4744, 4747 (1990) (dissenting op. Stevens, J.).

> [T]he jury determined that Shell was guilty of maliciously bringing a lawsuit against plaintiff to silence and muzzle him. . . . Shell engaged in a continuous course of conduct to thwart the open governmental process of resolving conflicting claims on a subject of marked public interest. . . . Shell's conduct threatened the indispensable rights of all citizens to appear before their government and to speak out in matters of public health and safety without fear of legal retaliation . . . . The pattern of reprehensible conduct also involved a continuous misrepresentation of the nature and safety of the polybutylene pipe system. This pattern, . . . included the continuous threat of litigation against anyone who dared make any adverse comment about the polybutylene pipe system as well. The use of a superior fiscal position to silence opposing voices in public debate by the misuse of the legal process strikes at the very heart of the democratic process. Given this record, the jury could reasonably find that Shell's conduct was extremely reprehensible. As we have noted, Shell's management, the 'boys in Houston,' perceiving that the company was being hurt economically, decided to play 'hardball' in their effort 'to dampen or quiet these kinds of outspoken statements.' The game Shell elected to play was a legal game and the object of its suit the suppression of speech.

Shell does not make polybutylene pipe. Nor does it make the "fittings" critically necessary to join pipe together in a home's drinking water system. However, as the maker of a resin used by "extruders" to manufacture pipe, it perceived its economic interest in gaining approval throughout the United States, including California, of governmental bodies for a plastic drinking water system.

In the Spring of 1980, Shell sent its own representative to tell California public health officials that the advocated system was "100 percent safe," (RT 1194:1-7; 1137:24-27; Trial Exhibits 18 and 20) was solely "polybutylene," (RT 1380:19-1381:20) which polybutylene was made up of only three ingredients, (RT 1378:14-1381:20) and needed no independent testing by state officials charged with the responsibility of protecting the health and safety of Californians. (RT 1379:19-1380:18) These representations were false, and Shell, of course, knew it.

In fact, Ray Leonardini's testing, as Shell was later forced to admit (RT 1413:11-24; 1089:3-28; 1621:23-26), revealed that the resin that goes into polybutylene contains a BHT chemical. (RT 1423:18-1424:4) In early 1980, there was a growing level of concern about the antioxidant BHT and studies reported in scientific literature found that it promoted or accelerated tumor development and was then under review by the FDA. (RT 1392:6-21) Further, no independent testing of a polybutylene system had ever been done by anyone, before Ray's testing, to conclude it was "100 percent safe." (RT 2102:18-2103:2) Of critical importance, part of the system, the "fittings," without which there could be no system, were not polybutylene at all but a "polyacetal" made from molecules of formaldehyde – a trioxane – a known carcinogen that breaks down in a water system and in the human stomach. (RT 1560:16-1562:12; 1462:15-1463:2; 1465:1-20) Shell would withhold this information from state officials until it came out at the trial in this case. (RT 1470:4-10) In fact, in furtherance of this course of conduct, Shell had entered into a secret agreement, also denied until disclosed in this case, with the Celanese Corporation of America – the makers of the polyacetal Celcon fittings – which specifically called for the withholding of information regarding these polyacetal fittings from the California public officials then investigating the health and safety of the

proposed, misrepresented system. (RT 1583:6-1584:22; Trial Exhibit 31)[3]

Ray Leonardini, a former Jesuit priest and public official, then a conscientious young attorney representing a client before public bodies on critical public health policy issues, working with scientists and state consultants, had made important discoveries concerning the dangers of PVC and CPVC pipe. (RT 1057:10-1060:20) His earlier discoveries resulted in the State of California doing independent health studies through an EIR process, rather than relying upon manufacturers' representations that their pipes were also "100 percent safe." (RT 1091:24-1092:22) Thereafter, he turned his attention to polybutylene plastic pipe and what everyone had been told was a completely polybutylene pipe system. (RT 1112:2-12)

Ray again hired qualified scientists, Cal Lab, a reputable lab regularly used by the Shell Oil Company (RT 1679:1-8), to first, independently test *pipe* (not resin) manufactured by various companies – but not Shell. The tests, dated December 31, 1980, on pipe manufactured by Westflex Manufacturing Company of Richmond, California, (Trial Exhibit 13; RT 2300:2-12) found high levels of DEHP *and* BHT. (Trial Exhibit 13) This represented the first time anyone in the United States had independently tested a polybutylene pipe. (RT 2102:18-2103:2) The accuracy of these tests was verified by the state through the California Air Resource Laboratory. (RT 1128:1-1129:2) Next, Ray had the *fixtures* tested, the flexible pieces of tubing that go under the sink in a home water system. Again, the

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[3] In addition to the polyacetal toxic problem, Shell was also hiding massive mechanical failures of whole subdivisions fitted with the system throughout the United States. (RT 1611:24-1612:14; 1617:16-1618:2; 1989:4-1992:5; 1993:2-1994:3; 1999:14-23) Not only did the system with the Celcon fitting leech formaldehyde and trioxane into a water system at dangerous levels (RT 1462:15-1463:2), it didn't work!

tests, dated March 18, 1981, found DEHP and BHT in all four samples. (RT 1513:26-1514:5) The only part of the system not tested by Ray, before August, 1981, when Shell sued to stop him and Cal Lab, were the fittings.[4] Ray and the State of California were one test away from discovering the truth: the *polyacetal* fitting which Shell's own internal memo called the "albatross" of the system (RT 1617:16-1618:2); that was the subject of a secret agreement with the Celanese Corporation; which would have set off "alarm bells" with state health officials, had they known. (RT 1445:8-1446:11) Shell had no intention of telling them. (RT 1588:5-27)

When a powerful state legislator suggested the system advocated by Shell should undergo the independent testing required of other plastics, Shell and its legal staff

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[4] Shell's test in response, done on water delivered to a lab by Shell, was on *water* alleged to have been in contact with pipe not on *pipe* itself. (RT 2432:28-2433:9) Shell misrepresented the results to the State. (RT 1416:20-1421:8) Similarly, a number of other Cal tests were on water, not pipe (RT 1275:8-1276:1), or on pipe manufactured by other manufacturers. (RT 1284:20-1285:13) It is undisputed that the BHT found and disclosed for the first time by Cal Lab's tests is in Shell's resin, although Shell had denied this until Ray's testing. (RT 1089:3-28) Cal's miscellaneous other tests that were not remarkable were in fact made known to the State's health officials by Ray. (RT 1273:1-3; 1284:1-5; 1276:15-16) Finally, Ray never said anything about Shell's product, resin. (RT 1162:4-7) He explained the probable source of DEHP as a contaminant in the extruding process by manufacturers. (RT 1163:21-1165:20) Shell's own representative knew that, while improper, extruders were regrinding other pipe and mixing it in with Shell's resin. (RT 1996:1-1998:8) There was no quality control on manufacturers. (RT 1744:24-1745:3) Ray certainly never said that polybutylene pipe causes cancer as suggested by Shell; and at all times advocated *only* complete and independent testing by the State of California before the unrestricted use of plastic pipe be permitted to carry drinking water. (RT 1091:7-23)

threatened to sue him if he did not desist. (Trial Exhibit 3; RT 1074:17-1078:14) Shell assured its local representative that "they had a battery of attorneys to handle people like that and they'll turn it over to their legal department." (RT 2003:10-23) When the state's own consultant suggested the need for further study because the toxicity information was incomplete, he was warned by Shell to stop making such further public comments on the matter of public controversy. The warning came from Dr. Schimbor, the head of polybutelene at Shell, with copies to Shell's legal counsel and the state official's superior. (RT 1432:5-20; RT 1421:3-20, Trial Exhibit 29)

By April, 1981, the state decided, after giving Shell a full opportunity to be heard, (RT 2093:12-17; 1671:20-1672:1) that public health and safety required independent testing. The public debate, however, including the protocols – what and how to test – raged on. Shell knew that unless the right tests were done, and on the whole system, the secret of polyacetal would remain unknown to public officials. The testing then proposed, and later carried out, was *not* such as to discover the formaldehyde secret. (RT 1468:16-1469:27)

Meanwhile, at Shell, "some boys in Texas" were getting upset. They decided Ray had to be stopped:

> Mr. Schimbor was very emphatic about doing whatever was necessary to see if they could eliminate Mr. Leonardini and his tenaciousness from the hearings. (RT 2008:4-2009:11)

He was "too effective" (RT 2002:2-22) and they had decided to play "hardball." (RT 1430:24-1431:10) They "hated his guts." (RT 2008:4-17; 2008:18-2009:11) Later, after the suit was filed, the same local attorney who represented Shell before the state agencies and whose firm filed the lawsuit, would apologetically explain to the primary state health official that the suit was not his doing, but was:

> The work of a group of lawyers in Houston and that the group in Houston had really insisted on it. (RT 1436:17-1437:6)

At trial, neither Shell's lawyers in Houston nor its local counsel were permitted, by Shell, to be deposed or called as witnesses. Instead, Shell asserted the attorney/client privilege and specifically withdrew "advice of counsel" as a defense to the malicious prosecution action.

So, Shell sued Ray – individually, not his union client – and they sued Cal Lab supposedly for an injunction and declaratory relief. But Shell, from President Street on down, knew that no court in the United States had ever prevented speech on a matter of public concern. (RT 2091:6-13) It knew it made no legal or logical sense to "ban" a report already legitimately part of a governmental proceeding – a public record – on a matter of public health and public policy. (RT 2094:12-24; 2097:24-2098:3) It knew that anyone in the world (except Ray?) could obtain or discuss the public record. In fact, Shell sent a letter nationally to anyone interested in the public debate stating:

> All this information is part of the public record and is available to anyone who wishes to write us. (Trial Exhibit 17; RT 1172:24-1174:20)

But a ban is what it professed to want. (RT 1670:10-25) Apparently, Shell wanted the public to read only its side of the debate in the public record.

Immediately upon filing the suit, the "irreparable harm unless restrained" and the need for a temporary restraining order to stop Ray speaking publicly or to public officials disappeared. Instead, a public relations release immediately issued nationally from Houston, Texas, announcing the federal lawsuit against Ray Leonardini and the lab that had performed tests submitted to the public agencies in California. (RT 1552:6-16) Then followed a letter to the public body advising it that the "only" basis for independent testing was Cal Lab's

tests and that the "Shell Oil Company had instituted an action in a United States District Court to enjoin any further publication of such erroneous information." (Trial Exhibit 20; RT 1181:22-1183:2)

Next, Shell's legal staff applied economic coercion to the independent laboratory upon which Ray relied to try to force it to give a statement to "neutralize" Ray in the ongoing political debate. (RT 1924:13-20; RT 1946:12-23) Shell's lawyers made clear the suit had nothing to do with seeking legal relief, but was being used to intimidate and extract concessions to influence the public debate and the governmental decision making process. (RT 1948:23-28)

Unfortunately for Shell, it soon found it was riding the back of the tiger. The little independent laboratory, even in the face of Shell, would not compromise its integrity and admit anything was wrong with its tests submitted to and verified by the state. (RT 1861:3-19; 1925:24-1926:1) Ray's attorney was demanding unconditional dismissal of the constitutionally untenable suit. (RT 1801:6-9; CT 39-40) Finally, Shell took whatever statement it could get from Cal Lab. Cal Lab was completely vindicated. (RT 1933:13-1934:13) Three days before Ray's motion to dismiss was scheduled to be heard, Shell dismissed the federal action. Judgment with prejudice was entered in his favor. (CT 61)

But, as the court of appeal Opinion correctly observed, Shell's abusive tactics were effective: "If Shell's purpose had been to intimidate plaintiff, it succeeded." Opinion, p. 63a. Shell is currently still attempting to obtain approval of polybutylene pipe system for the drinking water of Californians – and Ray Leonardini has effectively been removed from the process by Shell's abusive and malicious conduct – and now devotes much of his time to noncontroversial hospice and religious work.

REASONS FOR DENYING CERTIORARI

I.

LACK OF JURISDICTION: HOW THE FEDERAL QUESTIONS WERE *NOT* RAISED AND *NOT* PASSED UPON

Glaring in its absence from Shell's table of contents and jurisdictional statement is a clear and concise compliance with this Court's rule 14.1(h) which requires, as to the "Questions Presented for Review," the following:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the *stage* in the proceedings, *both in the court of first instance and in the appellate courts,* at which the federal questions sought to be reviewed were *raised;* the *method or manner* of raising them *and the way in which they were passed upon by those courts;* and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. . . . (Emphasis added.)

Even more glaring, but understandable in light of Shell's inability to comply with rule 14.1(h), is the total absence from the California Court of Appeal Opinion of any reference whatsoever to the federal constitutional issues sought here to be reviewed. In essence, this Court is asked to review an Opinion of the California Court of Appeal on subjects not decided by said state court. This Court has correctly observed that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved

party in this Court can affirmatively show to the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); *see, Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 131-33 (1905); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983). In *Street v. New York*, 394 U.S. 576, 581-582, this Court explained:

> The New York Court of Appeals did not mention in its opinion the constitutionality [of the statute]. . . . Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals. . . . If the question was not so presented, then we have no power to consider it. See 28 U.S.C. Section 1257(2), 1257(3). [Citation] Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts. . . .

It is, of course, central to the jurisdiction of this Court under section 1257, that a substantial federal question has been properly raised in the state court proceedings. Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., sec. 3.21, p. 149. As this Court's own rule demonstrates, Shell should have raised the federal question at the outset and not as an afterthought when it lost below. Association of new counsel at the California Supreme Court level does not excuse jurisdictional requirements.

In this case, Shell never articulated any of the issues sought to be reviewed "in the court of first instance" (rule 14.1(h)) and did not brief or argue any of said issues

before losing in the court of appeal.[5] Shell conceded that the constitutionality of punitive damages was never adequately and properly presented until after it lost the case in the trial court, lost on appeal, and for the first time raised this point at the level of discretionary review by the California Supreme Court:

> One of Shell's grounds for certiorari involves the constitutionality of punitive damage assessments.[4]
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> * * *
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> [4] Shell adequately preserved this objection by presenting it to the California Supreme Court *in the first instance.*

Memoranda of Points and Authorities in Support of Ex Parte Application of Stephen W. Jones on behalf of defendant Shell Oil Company for Order Staying Enforcement of Judgment, p. 6, and n. 4 (filed April 17, 1990, Sacramento County Superior Court) (emphasis added).

Shell attempts to escape the jurisdictional requirement of this Court as enunciated in rule 14.1(h) by *now* suggesting to this Court that it did in fact make vague references to constitutional questions at each stage. For

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[5] Shell says, *without citation to the record,* (Petition for cert., at p. 18) that it "renewed the objections before the court of appeal." It did not, as evidenced from the Opinion of that court. If Shell means to suggest it made some reference to the constitution *after* the court of appeal decision, such belated and inadequate reference comes too late to invoke this Court's jurisdiction: "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, *unless the court actually entertains the question and decides it.*" *Herndon v. Georgia,* 295 U.S. 441, 443 (1935) (emphasis added); Stern, Gressman, Shapiro, *Supreme Court Practice,* 6th ed., at p. 155. No California court, at *any* stage, entertained or decided any of the "issues" raised here by Shell.

example, it suggests that it properly presented the issue to the trial court in a motion for new trial. Petition for cert., p. 18. In fact, the "adequate presentation" of this fundamental issue was relegated solely to a footnote in a 93-page brief suggesting that there were "important issues" that must be resolved, concerning punitive damages, in an appropriate setting under the federal *and state* constitutions. (CT 775) *Compare, Beck v. Washington*, 369 U.S. 541, 553 (1962). No constitutional argument whatsoever was presented to the trial court in the brief; no oral argument whatsoever was ever presented to said court; and no decision was made by the trial court on constitutional questions. Similarly, in the court of appeal, the issues here were not briefed, not argued, and not decided.[6] Shell is strangely silent in explaining "the way in which they were passed upon by those courts" (rule 14.1(h)), or why such courts, if in fact the issues were properly raised, did not rule upon them.

Shell further attempts to explain its failure to adequately raise such issues by suggesting that it would be fruitless to do so at any time prior to the California Supreme Court. Such a suggestion, that issues need not be properly raised, objections properly made, and a record properly kept, prior to the time of reaching the

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[6] As noted in a leading work on Supreme Court practices: "Briefs and oral arguments before state courts are not ordinarily part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. [Citation]." Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., at p. 157. As stated in *Lynch v. New York ex rel Pierson*, 293 U.S. 52, 54 (1934): "Nor can a claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record." There is thus nothing in the record certifiable to this Court showing the constitutional issues were timely and properly raised. They were not!

highest court which has previously ruled on a constitutional issue, would make a mockery of this Court's jurisdictional rules.[7] In essence, persons could apply to this Court to decide fundamental federal constitutional issues which have been previously ruled upon by this Court without ever having raised the issue below in any manner whatsoever in the trial court or the appellate court, in the state or federal system, and raise it here for the first time on the basis that only the United States Supreme Court can reverse one of its own decisions.

Such a rule is not the rule of this Court; nor is it the rule of the California courts, including the supreme court. As Shell correctly notes, the California Supreme Court refused to hear this case. As they incorrectly note, however, neither that court nor any justice thereof stated a willingness to hear all issues presented by Shell, including those constitutional issues raised for the first time at the California Supreme Court level. Indeed, California has rules similar to this Court wherein the Supreme Court of California is constitutionally limited in its function to reviewing the *decisions* of the courts of appeal. Cal. Const., art. 6, sec. 12(b) (Appendix A). In furtherance thereof, California Supreme Court rule 29 (Appendix B) precludes the raising of issues for the first time in the California Supreme Court that have not been timely briefed and raised in the court of appeal.

In "Answer to Petition for Review" in the California Supreme Court, respondent Raymond Leonardini raised

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[7] Compare the diligence of petitioner, in the face of adverse Alabama precedent, to comply with rule 14.1(h) in *Haslip*: "Pacific Mutual raised its constitutional challenges to an award of punitive damages at the answer stage, preserved such issue at trial and vigorously advanced those issues on appeal, in its briefs, at oral argument, in the post-trial letter briefs and in its petition for rehearing." And, the Alabama Supreme Court passed on the federal constitutional challenges. Petition for cert., at p. 4; *Pac. Mut. Life Ins. Co. v. Haslip*, No. 89-1279.

exactly these points to the Supreme Court of California, pointing out, as he does here, that the constitutional federal due process issues now being raised had never been adequately, timely and properly raised. As stated to the California Supreme Court:

> At *trial* in this matter, Shell [CT 517; 555] submitted instructions asking for the normal 'preponderance of the evidence' civil standard on all issues including damages. Shell submitted instructions providing for a non-unanimous civil verdict. [CT 521; 552] In fact, the jury verdict was unanimous. [CT 629; RT 2697:25-26] Plaintiff submitted, and the court gave BAJI 14.71 instructing the jury on the manner of assessing punitive damages [CT 605]. Shell provided no alternative instruction.
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> On appeal, Shell correctly notes that the Opinion of the Court of Appeal does not even mention this 'issue.' [Petition for Review, p. 30, fn. 22] Again, the reason is simple. The constitutional issue was raised by Shell for the first time in its Reply Brief, with the suggestion that *Banker's Life & Cas. Co. v. Crenshaw* (1988) 406 U.S. 71, was then pending before the Supreme Court and
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> 'If the court reaches the merits of these issues in *Crenshaw*, Shell would consider suggesting that supplemental briefs be received. [Reply Brief, p. 31, fn. 40]' *Crenshaw* was decided and was of no avail to Shell. Accordingly, the constitutional issues were not sought by Shell to be briefed, were not properly before the Court of Appeal and were not even mentioned by Shell on oral argument before the Court of Appeal.
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> There is no basis for this Court, especially on this record and when the Court of Appeal Opinion to be reviewed does not even discuss the subject, to accept this case to determine federal constitutional law . . . .

It was on this presentation that the California Supreme Court denied Shell a hearing. To suggest that the three Justices voting to grant the petition were willing to consider *all* issues, including the constitutional issues, is both irrelevant and a distortion of the California Supreme Court rules relating to the denial of a petition for review. It is irrelevant in the first instance because the California Supreme Court did *not* grant review of *all or any* issues. It is also a distortion of California Supreme Court rule 29.2(b). (Appendix C) *After* the California Supreme Court *grants* a petition for review, it may specify the issues to be argued and limit briefs to those issues. To suggest that when the court does *not* take a petition, any inference may be drawn to what issues might have been taken had the court determined that some or all of the issues had been timely raised is mere conjecture: "Jurisdiction cannot be founded upon surmise." *Lynch v. New York ex rel Pierson*, 293 U.S. 52, 54 (1934).

There is no opinion given by the California Supreme Court as to why it did not take the case; nor is there any opinion as to what the Justices on the losing side of the vote had in mind when they voted to grant a hearing. Clearly, given the arguments made by respondent and the total absence in the court of appeal Opinion of any of the issues sought here to be reviewed, the refusal by the California Supreme Court might well have been based upon the failure of Shell to properly raise the issues in the trial court and in the appellate court. Under such circumstances, it is generally recognized:

> Such refusal by the highest state court *might* have been based upon the adequate state grounds that the constitutional issue was not raised in the trial court, as required. And the Supreme Court feels that it is without jurisdiction 'when the question of the existence of an adequate state ground is debatable.' (Citing *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).)

Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., p. 153 (1986) (emphasis added).

Clearly, reasonable state procedural requirements may not have been observed, accounting for the failure of the state courts to rule on the federal issues. This precludes review on certiorari by this court. *Stembridge v. Georgia*, 343 U.S. 541-48 (1952); *Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291-309 (1903).

Nor, as suggested by Shell, did the California Supreme Court abrogate its own rule requiring the timely raising of issues in the case of *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal.3d 289, 292, n. 1; 758 P.2d 58; 250 Cal.Rptr. 116 (1988). Petition for cert., pp. 16-17. Rather, *Moradi-Shalal* merely noted that since the issue was raised for the first time in the California Supreme Court and since review *was granted* without limitation, the issue could be considered. This is no different than this Court's own rule that if, in fact, the highest state court has actually passed upon a federal question, any inquiry into how and when the question was raised in the state court is irrelevant to the exercise of this Court's jurisdiction. Stern, Gressman, Shapiro, *Supreme Court Practice*, 6th ed., sec. 322, "Effect of State Court's Determination of Federal Question," p. 158. But in *this case*, respondent Leonardini pointed out to the California Supreme Court that the issue was not properly raised, was not part of the decision to be reviewed, and therefore not properly before the California Supreme Court. The California Supreme Court, from all appearances, agreed and did not take the case for consideration. As presented to this Court, the California trial court, appellate court and supreme court have never considered and ruled upon any of the issues presented to this Court.

Finally, to the extent that Shell argues that the first amendment of the United States Constitution permits prior restraint of public debate on a public policy issue (petition for cert., pp. 19-21), this Court lacks jurisdiction to review the judgment. The California court's free speech analysis was based on the independent and adequate state grounds of the Cal. Const., art. 1, sec. 2,

subdivision (a) (Appendix D). Opinion, p. 2, n. 1. *See,* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489 (1977); O'Connor, *Our Judicial Federalism,* 35 Case W. Res. L. Rev. 1 (1984); *see also,* Falk, *The State Constitution: A More than "Adequate" Non-Federal Ground* (1973) 61 Cal. L. Rev. 273; Poswall, *The Right to Violate an Injunction,* 56 Cal. L. Rev. (1967); Poswall, *The Supreme Court of California, Injunctions,* 56 Cal. L. Rev. 1665 (1967).[8]

Petitioner Shell has not, and cannot, show that the federal question was timely and properly raised or passed upon by the California courts so as to give this Court jurisdiction to review the judgment on a writ of certiorari. Accordingly, the petition must be denied for lack of jurisdiction.

II.

SHELL'S INTENTIONAL AND MALICIOUS ATTEMPT TO SUPPRESS FREE SPEECH AS A BASIS FOR PUNITIVE DAMAGES

We agree with Shell when it states in its brief "this case differs from *Haslip* in its importance. Punitive damages were not here imposed to deter shoddy manufacturing, curtail sharp sales practices or root out insurance company misbehavior." Petition for cert., p. 3. Rather, punitive damages were here imposed for intentional and malicious conduct which had as its basis the suppression of free speech and public debate in the political process.

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[8] In any event, the Opinion *correctly* held that a prior restraint on political speech was unconstitutional under the federal constitution, *also. Near v. Minnesota,* 283 U.S. 697 (1931), *New York Times Co. v. United States,* 403 U. S. 713 (1971); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968); *Bantam Books v. Sullivan,* 372 U.S. 58 (1963).

Said conduct had as its means the abuse of the court system to suppress political opponents from speaking out and chilling others who might dare. These are the unanimous findings of a jury, as independently reviewed by a trial judge, and as unanimously upheld by an appellate court. It is on this record that Shell seeks this Court's intervention.

A. Intentional and Malicious Conduct.

Justice Rehnquist, speaking in dissent in *Smith v. Wade*, 461 U.S. 30, 87 (1983), has persuasively argued that punitive damages should not be imposed against persons who are not wrongdoers, persons who mean no harm and persons who are not guilty of actual malice. In this case, Shell was guilty of all of such elements. Nor, according to the *Restatement (Second) of Torts*, sec. 909, and concurred in by California law (California Civil Code, sec. 3294(b)), should punitive damages be imposed vicariously against persons or companies who do not actively participate in the wrongdoing. Unlike the facts in *Haslip*, this case presents no such imposition. Rather, there is no question on the facts of this case, as found by the jury, that Shell, from the very top officers down to the legal department, carried out an intentional corporate policy to suppress evidence before public agencies and before courts and sought to silence any political opposition, whether public citizens or public officials, in furtherance of that corporate policy. Such a calculated and intentional corporate policy justifies the imposition of punitive damages against the corporation. *Neal v. Farmers*, 21 Cal.3d 910; 582 P.2d 980; 148 Cal.Rptr. 389 (1978).

This case is, in fact, not unlike others that have come before the Court wherein fundamental constitutional rights have been the subject of suppression and punitive damages, on standards less rigid than those used in California, have been the remedy affirmed by this Court. *Memphis Community School Dist., et al. v. Stachura*, 477 U.S.

299, 304 (1986), punitive damages were upheld; reversed on other grounds, *id.*; *Smith v. Wade*, 461 U.S. 30 (1983); *Carlson v. Green*, 446 U.S. 14, 22, n. 9 (1980); *Carey v. Piphus*, 435 U.S. 247, 257, n. 11 (1978). Indeed, this case meets the standards established by eight, if not nine, of the Justices of this Court in *Smith v. Wade*, including the dissenting opinion of Justice O'Connor wherein she stated:

> I cannot concur . . . with the suggestion that punitive damages should not be available even for intentional or malicious violation of constitutional rights . . . .

Id., p. 94. In essence, the intentional and malicious actions of Shell were designed to undermine the constitutional rights of the plaintiff and all others who would participate in democratic decision-making processes of the State of California then ongoing concerning plastic pipe and drinking water.

The tort of malicious prosecution is, by nature, an intentional tort which has, under California law, as its element, the intentional bringing of a civil action without probable cause and with malice. Opinion, p. 21a; Cal. Jury Instns., Civil, Book of Approved Jury Instructions, 7th ed. (1986) No. 7.32. As noted in *Smith v. Wade* by Justice Rehnquist in dissent, the common law of California, since at least the 1860's – and as later codified in Civil Code 3294 in 1872 – has required actual malice, wrongful intent, wanton or malicious motives, willful unjust or oppressive conduct in order to recover punitive damages. *Smith v. Wade*, 461 U.S. 30, 77-78 and n. 12 (1983).

The malice required for malicious prosecution is malice in fact. *Bertero v. Nat'l Gen'l Corp.*, 13 Cal.3d 43, 66; 529 P.2d 608; 118 Cal.Rptr. 184 (1974). Of course, the "malice in fact . . . may be proved under section 3294 either expressly (by indirect evidence probative of the existence of hatred or ill will) or by implication (by direct evidence

from which the jury may draw inferences)." *Davis v. Hearst*, 160 Cal. 143, 162; 116 P. 530 (1911); *Bertero v. Nat'l Gen'l Corp.* 13 Cal.3d 43, 66; 529 P.2d 608; 118 Cal.Rptr. 184 (1974). In addition, in order to properly safeguard access to the courts for the redress of grievances, an access which may indeed be grounded in the first amendment as noted by the California appellate court in this case (Opinion, p. 21a), California courts have severely restricted the tort of malicious prosecution. Recently, under a standard applied to this case, the California Supreme Court narrowed malicious prosecution by imposing one of the most rigorous standards in the country relating to a finding of lack of probable cause. *Sheldon Appel v. Albert & Oliker*, 47 Cal.3d 863; 765 P.2d 498; 254 Cal.Rptr. 336 (1989). But there are some cases and some defendants who will, despite the great liberality provided to them, go beyond all bounds and abuse our court system in pursuit of suppressing the very rights upon which our court system and democratic principles are founded. This is such a case. The jury in this case was instructed that the malice required for malicious prosecution was:

> The words 'malice' and 'malicious' mean a wish to vex, annoy or injure another person. Malice means that attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose. (CT 599)

The jury was further instructed under California law that to impose punitive damages in this case, it had to find "malice" or "oppression." These terms were specifically defined as follows:

> 'Malice' means conduct which is *intended* by the defendant to cause injury to the plaintiff or carried out by the defendant with a *conscious* disregard of the rights of others. One acts with *conscious* disregard of the rights of others when it is aware of the probable consequence of its conduct and *willfully and deliberately* failed to avoid those consequences.

The term "oppression" was defined to the jury as:

> 'Oppression' means subjecting a person to cruel and unjust hardship in *conscious* disregard of that person's rights. (CT 605; BAJI 14.71.)

Shell in its petition for certiorari quotes from the comments of federal Judge Lawrence Karlton at the time of the dismissal of this action. While such comments of Judge Karlton were specifically excluded from evidence in this case by Shell's motion (CT 296-305; RT 3:18-4:1; 18:21-19:14), respondent quotes the part left out by Shell. The federal judge, comparing Shell's actions to another maliciously prosecuted action by a large Sacramento developer against environmentalists, stated that Shell's action "reeks of corporations with great economic power in this country seeking to silence political debate." (Trial Exhibit 24)

B. California Standards for Imposition of Punitive Damages[9]

As noted earlier, the tort of malicious prosecution is strictly construed requiring intentional conduct and malice in fact. In addition, the California Supreme Court has required that the question of probable cause to bring a civil action be exclusively determined by the trial judge, not the jury. *Sheldon Appel v. Albert & Oliker*, 47 Cal.3d 863; 765 P.2d 498; 254 Cal.Rptr. 336 (1989). This practice was followed in this case and it was only after a ruling by the trial judge on the lack of probable cause of the lawsuit

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[9] Respondent notes, parenthetically, that challenges made to *California's* punitive damage statute, in the light of granting certiorari in the *respondeat superior* setting of Alabama's less rigid laws, *Pac. Mut. Ins. Co. v. Haslip*, No. 89-1279, have not received any votes of the Justices of this Court. *See, Comora v. Radell*, No. 89-1169; *Schaefer v. Gallego*, No. 89-1803; *Blue Cross of California v. Hughes*, No. 89-1607 (denial of stay of judgment, O'Connor, J.; dismissed thereafter pursuant to rule 46).

actually brought by Shell against Raymond Leonardini that the jury was permitted to decide those factual issues submitted to them.

Further, under California law, no discovery is permitted on the issue of punitive damages without first a finding, after hearing, by a court that there exists a "substantial probability" that the plaintiff will prevail on such issue. Civil Code, sec. 3295(c). At the trial itself, as in this case, no evidence of wealth of the defendant is admissible until the plaintiff put on his case and satisfied the trial judge that a sufficient showing had been made of intentional and oppressive conduct permitting the imposition of punitive damages. Civil Code, sec. 3295(a).[10]

On the standards for the imposition of punitive damages, California law is not only contained in Code of Civil Procedure, sec. 3294, but in over 140 years of common law. *Wilson v. Middleton*, 2 Cal. 54 (1852), and was codified in Civil Code, sec. 3294, in 1872, *Grimshaw v. Ford Motor Co.* 119 Cal.App.3d 757, 807; 174 Cal.Rptr. 348 (1981). The principles that guide the courts of California and which are incorporated in the standards given to the jury, have been described as:

> [E]stablished principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citation] Another relevant yardstick is the amount of compensatory damages awarded;

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[10] In the trial below, Shell made no motion to bifurcate the issue of punitive damages from the malicious prosecution liability issue. This generally recognized practice is now codified by statute giving the defendant the absolute right to such bifurcation under California law. Civil Code, sec. 3295(d).

> in general, even an act of considerable reprehensibility will not been seen to justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small. [Citation] Also to be considered is the wealth of the particular defendant; obviously, the function of deterrents . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.

Neal v. Farmer's Ins. Exch., 21 Cal.3d 910, 928; 582 P.2d 980; 148 Cal.Rptr. 389 (1978). In requiring that each of these elements be taken into consideration by the jury, the standards in California go beyond those enunciated by the American Law Institute in the *Restatement (Second) of Torts*, sec. 908.

Of course, a California jury is vested with discretion, subject to the trial judge's review on motion for remittitur or new trial (Code of Civil Procedure, sec. 657(5)), and appellate review, in weighing the reprehensibility of the conduct, determining the amount of punitive damages that will have a deterrent effect in light of the defendant's financial condition, and insuring a reasonable relationship between the general damages and the punitive damages. But that is ultimately what the jury system is about and, frankly, those who would so limit discretion as to eliminate it altogether, simply show a distrust of the American jury system and the development of the common law. Shell, in its petition, cites part of *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 388; 202 Cal.Rptr. 204 (1984). They fail to add the rest of the quotation by the learned court:

> We have examined a number of appellate decisions in an effort to determine whether we could discern from the cases a single formula for

> calculating punitive damages. For those with a mathematical bent, the attached appendix reflects part of our research. Frankly, we are unable to find that formula. Instead of making a mathematical breakdown, we discovered what everyone probably already knew: the formula does not exist. *And, we have concluded, that is properly so.*
>
> Although we may now live in a highly computerized society, it is important to recognize the justice system need not and should not mirror a mechanistic view of life. The life of the law should continue to be experience. The concept of justice connotes a human process, performed by judges and juries in good faith, exercise with compassion, still tinged with sufficient subjectivity to conform the rules of law to the realities of life.

Id., at 388 (emphasis added).

Justice O'Connor, in *Browning-Ferris Industries, et al. v. Kelco Inc., et al.*, 492 U.S. ___; 106 L.Ed. 2d 219, 254; 109 S.Ct. 2909 (1989) (dissenting) quoting Blackstone, recognizing the same concept as the *Devlin* court:

> [T]he *quantum*, in particular, of pecuniary fines neither can, nor ought to be ascertained by an invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's. 4 Blackstone, *Commentaries*, 371.

Given the innumerable combinations of circumstances that may come into play when punitive damages are sought, *i.e.*, a section 42 *U.S.C.* 1983 action for the torturing of a civil rights worker; the knowing placement on the market of a dangerous product; a fraudulent business practice; or the intentional, deliberate and malicious abuse of the court system to thwart fundamental free speech rights and public participation in government – it

is neither possible nor desirable to so restrict punitive damages or the role of the jury so as to undermine both. Ultimately, due process has to do with fundamental fairness and the guarantee that each party has "the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

III

IS TWO HOURS OF SALES A "GROSSLY EXCESSIVE" PUNITIVE DAMAGE AWARD FOR WHAT SHELL DID?

Shell had that opportunity to be fairly judged and was found to have acted in an extremely reprehensible manner that "strikes at the very heart of the democratic process." Opinion, p. 66a. Shell was further found to have caused substantial damage to the plaintiff himself who suffered immensely by reason of this abusive use of the court directed to punish him in the exercise of his free speech rights as an effective advocate in public debate. Faced with determining the appropriate amount of punitive damages that would have a deterrent effect, the jury had before it extensive evidence of Shell's financial condition, sales, earnings and profits. (RT 2105-17) Having been cautioned to maintain a reasonable relationship between the general damages awarded and the punitive damages while at the same time imposing a sufficient punitive award to "send a message" to Shell and others to deter such reprehensible conduct in the future, the jury acted conservatively. While the award of punitive damages represented 25 times the general damages and is a large sum of money, it, in fact, represented only 1/25th of one percent of the net worth of Shell and accounted for only two hours of sales by said company! Is this really so much, as to be called constitutionally impermissible and "grossly excessive," to preserve and protect free speech and our basic democratic principals of participation in government? Can anyone, on the reprehensible conduct

of Shell in this case, state that the California standards as applied to such conduct was unreasonable? Unfortunately, to Shell, with $12.5 billion of net worth, the "message" may be so nominal as to go unheeded: "What is ruin to one man's fortune, may be a matter of indifference to another's." 4 Blackstone, *Commentaries*, p. 371.

While the due process clause may forbid civil damage awards that are "grossly excessive" or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable", (*Browning-Ferris v. Kelco Disposal*, 492 U.S. ___; 106 L.Ed.2d 219, 241-42; 109 S.Ct. 2909 (1989) (concurring opinion of Brennan, J., in which Marshall, J., joined)) this is not such a case.

IV

AT NO TIME, EXCEPT BEFORE THIS COURT, HAS SHELL RAISED THE BURDEN OF PROOF ISSUE. THE EXACT INSTRUCTION ON BURDEN OF PROOF GIVEN TO THE JURY WAS SUBMITTED BY SHELL.

As we have noted in the jurisdictional section, none of the issues presented in the petition for certiorari by Shell are the subject of the Opinion of the court of appeal seeking to be reviewed by this Court. Ironically, Shell asks this Court to overrule an Opinion on grounds that can nowhere be found mentioned in the Opinion.

In its petition for certiorari, Shell, for the first time before this Court, asserts: "A third constitutional issue bearing upon the imposition of punitive damages is the proper standard of proof." Petition for cert., p. 14. Apparently consistent with its argument that it may raise issues for the first time in the California Supreme Court that were never raised in the trial court or in the appellate court and are not the subject of the appellate court opinion, Shell apparently believes it can raise issues for the first time in this Court with the same logic that only this Court ultimately can decide constitutional issues. Such logic on the part of Shell makes a total mockery of this Court's rule 14.1(h).

It is further inappropriate for Shell to suggest to this Court that the issue of burden of proof is properly before it when in fact the exact instruction on burden of proof of which Shell apparently complains, BAJI 2.60, was submitted and specifically requested by Shell to be given to the jury. (CT 513-517; 555; 595) If it was error, it was *invited* error. In fact, if it was error, it was error *requested* by Shell. Shell can hardly complain – for the first time in this Court having never been heard in the court of appeal or the California Supreme Court on this point – that a different standard than that requested by Shell itself should have been used by the jury.

CONCLUSION

The California appellate court opinion represents a victory for free speech on important public policy issues and public participation in governmental decision making. It also is a vindication of our court system against those who would abuse it. There is no basis – indeed, no jurisdiction – on this record for this Court to reach down and decide issues never properly raised and never decided by a single level of the California court system in this case – the trial court, the appellate court, or the

supreme court. Nor is there any basis on this record for this Court to leap to the defense of Shell in its calculated, intentional and reprehensible behavior that so threatens the basic tenants of political debate historically protected by this Court.

DATED: July 23, 1990.

Respectfully submitted,

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APPENDIX A

CALIFORNIA CONSTITUTION

Art. 6, Section 12. Supreme Court; transfer of causes

* * *

(b) The Supreme Court may review the decision of a court of appeal in any cause.

(c) The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

. . . .

(Added Nov. 8, 1966. Amended Nov. 6, 1984, eff. May 6, 1985.)

APPENDIX B

CALIFORNIA RULES OF COURT

Rule 29. Grounds for review in Supreme Court

(a) [Grounds] Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

(b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

As amended, eff. Jan. 1, 1983; May 6, 1985.

APPENDIX C

CALIFORNIA RULES OF COURT

Rule 29.2. Issues on review; grant and hold

(a) [Decision on limited issues] On review of the decision of a Court of Appeal, the Supreme Court may review and decide any or all issues in the cause.

(b) [Specification of issues] After granting review of a decision of a court of Appeal, the Supreme Court may specify the issues to be argued. Unless otherwise ordered, briefs on the merits and oral argument shall be confined to the specified issues and issues fairly included in them.

(c) [Grant and hold] After granting review of a decision of a Court of Appeal, the Supreme Court may order action on the cause deferred until disposition of Another cause pending before the court.

Adopted, eff. May 6, 1985.

APPENDIX D

CALIFORNIA CONSTITUTION

Art. 1, Section 2

Sec. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

. . . .

(3)

No. 89-2029

In The

Supreme Court of the United States

October Term, 1989

SHELL OIL COMPANY,

Petitioner,

v.

RAYMOND J. LEONARDINI,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California Third Appellate District

REPLY BRIEF FOR PETITIONER

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On Petition For A Writ Of Certiorari
To The Court Of Appeal Of California
Third Appellate District

REPLY BRIEF FOR PETITIONER

Whilst conceding that the judgment below penalizes Shell for the sole act of filing a complaint in a federal court (Br.Opp. 19-20) – which squarely raises the constitutional questions set out in the petition – the brief in opposition raises some objections that necessitate a reply under Rule 15.6 These objections are readily exposed as superficial.[1]

1. Under long settled principles, a federal constitutional question is properly presented for review by this Court if it is presented at the time and in the manner required by the law of the state from whose courts the question arises. *E.g., Edelman v. California,* 344 U.S. 357, 358 (1953). The brief in opposition submits that because no opinion of any California court treats or decides the precise constitutional questions in Shell's petition, Shell must have failed to present them properly. (Br.Op. 11-19). But no such rule could apply when a state's judicial

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[1] One of these will be so obvious to those accustomed to the practice of this Court as hardly to need mention. Respondent actually urges that certiorari should be denied because the petition does not contain a separate topic heading preceding the discussion as to how the constitutional questions were presented below. (Br.Opp. 11.) This objection has no substance. Shell's counsel solicited and got advice from the Clerk's office that the form it used was allowable. This advice was confirmed by a letter addressed to the Deputy Clerk who furnished the advice.

system requires presentation of a point of federal law to a court with discretionary reviewing power. Otherwise, a state court would effectively become the final arbiter of federal issues simply by declining to review or comment on those issues.

2. Under California's rigid view of *stare decisis*, a lower court "faced with higher authority" has the duty "of saluting and following orders." *Vaerst v. Tanzman*, ___ Cal.App.3d ___, 90 Cal. Daily Op. Svc. 6179, 6181 (Aug. 21, 1990; Poche, J., dissenting). The *Farajpour* case cited in the petition (p.17; now officially reported at 221 Cal.App.3d 19, 270 Cal.Rptr. 356) shows that it is not only idle, but it is improper, to ask a California Superior Court or Court of Appeal to join an emerging trend in the law, where to do so would require reexamination of State Supreme Court precedent. On such questions the Supreme Court of California is the proper court of first instance. To present such questions – as our petition does – to lower California courts would be, in Dean Wigmore's phrase, a violation of the canons of sober behavior.

Shell made the presentation required by California law when it petitioned the California Supreme Court, raised the questions now tendered for certiorari, and garnered three votes for an unrestricted review (of four required).

3. Respondent's comments about Shell's proposed jury instructions (Br.Opp. i, Question 3, and pp. 28-29), are fully answered by the last two points. Litigants in California Superior Courts are required to submit jury instructions. To fulfill this requirement cannot be a waiver of a federal constitutional right when, at the time

the instructions must be tendered, the court receiving them would "violate jurisdictional bounds"[2] by entertaining the position advocated in the proposed instructions. California does not require "pointless" presentation of a contention. *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal.3d 287, 292 n.1, 758 P.2d 58, 250 Cal.Rptr. 116 (1988).

Respondent misstates the record on the subject of the jury instructions proposed by Shell. Shell proposed a preponderance of the evidence standard of proof. That instruction, reprinted following this brief at Reply App. 1a,[3] does not propose that punitive damages be made subject to the preponderance standard. *See also* CT 555. The instruction which made punitive damages subject to a preponderance standard of proof is captioned as one of *plaintiff's* proposed instructions. Reply App. 3a. In California, Code of Civil Procedure §647 provides:

> "All of the following matters are deemed excepted to: the verdict of the jury; . . . an order or decision from which an appeal may be taken; . . . giving an instruction, refusing to give an instruction, or modifying an instruction requested. . . . "

4. There is no conceivable rule of California substantive law which could be an adequate ground to allow California to penalize Shell in a way inconsistent with the First Amendment right of petition or the Fourteenth Amendment. *Compare* Br.Opp. 18-19. While California

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[2] *Farajpour*, 221 Cal.App.3d at 40, *citing Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450 (1962).

[3] The Reply Appendix citations are to the Appendices to this brief.

could furnish greater protection of these rights it could not furnish less. Shell's compliance with California procedural law has already been demonstrated.

5. The questions Shell presents are not to be confused with the issues and remedies subsumed within those questions. A higher burden of proof may be one way to remedy constitutional deficiencies inherent in the imposition of punitive damages. So it was in *Gertz*.[4] But before the Court ever gets to remedying constitutional error it must find and declare it. Shell presented to the California Supreme Court the same claims of constitutional error under the First and Fourteenth Amendments now presented to this Court. Respondent makes no contrary contention. *Compare* Br.Opp. 28-29.

6. Respondent dwells on the jury's finding in this case that Shell acted with actual malice. Br.Op. 21. Such a finding was essential for the cause of action for malicious prosecution. It was based on a preponderance of the evidence standard of proof. Reply App. 3a.

This finding does not foreclose this Court's review. As a case concerning issues of alleged "public concern," culminating in Shell's exercise of the First Amendment right to petition, Shell contends that the punitive damage assessment impermissibly penalizes it for the exercise of its right. A preponderance of the evidence finding of malice does not detract from Shell's constitutional submission under the First and Fourteenth Amendments. Further, this Court would necessarily conduct a plenary

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[4] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

review of any jury finding of malice. *E.g., Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485 (1984). Here the proof of malice was insufficient to satisfy constitutional standards. Under the trial court's instructions, the jury was allowed to infer Shell's actual malice from the trial court's directed verdict that Shell lacked probable cause to file its action in federal court. *See* Pet. 10, 21. The directed verdict was based upon the supposed legal insufficiency of Shell's prayer in its federal complaint. App. 30a-32a.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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REPLY APPENDIX

BURDEN OF PROOF AND PREPONDERANCE OF EVIDENCE

In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

(1) That the defendant initiated or took an active part in the commencement of a civil proceeding against the plaintiff;

(2) That the civil proceeding against the plaintiff terminated in plaintiff's favor in a manner reflecting on the merits of the case;

(3) That the defendant had no probable cause in commencing the civil proceeding;

(4) That defendant acted with malice in commencing the civil proceeding;

(5) That plaintiff suffered actual injury as a result of the commencement of the civil proceeding.

By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all

of the evidence bearing upon that issue regardless of who produced it.

BAJI 2.60

GIVEN: _____
REFUSED: ✔
MODIFIED: _____

PLAINTIFF'S INSTRUCTION NO. ___
BURDEN OF PROOF AND
PREPONDERANCE OF EVIDENCE

The plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish:

1. Defendant SHELL OIL initiated a civil proceeding against the plaintiff;

2. The civil proceeding terminated in plaintiff's favor;

3. The defendant acted without probable cause in commencing the civil proceeding;

4. The defendant acted with malice in initiating the civil proceeding;

5. That the civil proceeding so initiated by defendant was a legal cause of damage to plaintiff;

6. The extent and nature of the damages suffered by plaintiff;

7. Nature and extent of punitive or exemplary damages to be awarded to plaintiff, if you find, under these instructions, that defendant SHELL OIL COMPANY was guilty of oppression or malice in the conduct upon which you base your finding of liability.

"Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

BAJI 2.60 and 7.32
GIVEN: ✔
GIVEN AS MODIFIED: ✔
REFUSED: _____
REQUESTED BY: _____

/s/ Illegible
JUDGE OF THE SUPERIOR COURT